DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-965
Title: Daimler AG, Petitioner
v.
Barbara Bauman, et al.
Docketed: February 7, 2012
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-15386)
Decision Date: May 18, 2011
Rehearing Denied: November 9, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 6 2012	Petition for a writ of certiorari filed. (Response due March 8, 2012)
Feb 27 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Mar 5 2012	Waiver of right of respondents Barbara Bauman, et al. to respond filed.
Mar 6 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Mar 7 2012	Brief amici curiae of Alliance of Automobile Manufcturers, Inc., et al. filed.
Mar 8 2012	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Mar 8 2012	Brief amicus curiae of New England Legal Foundation filed.
Mar 14 2012	DISTRIBUTED for Conference of March 30, 2012.
Mar 21 2012	Response Requested . (Due April 20, 2012)
Apr 10 2012	Order extending time to file response to petition to and including May 21, 2012.
May 2 2012	Order further extending time to file response to petition to and including June 11, 2012.
Jun 11 2012	Brief of respondents Barbara Bauman, et al. in opposition filed.
Jun 26 2012	Reply of petitioner Daimler AG filed. (Distributed)
Jun 27 2012	DISTRIBUTED for Conference of September 24, 2012.
Apr 17 2013	DISTRIBUTED for Conference of April 19, 2013.
Apr 22 2013	Petition GRANTED.
Apr 30 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 27, 2013.
Apr 30 2013	The time to file respondents' brief on the merits is extended to and including August 19, 2013.

May 28 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
May 30 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Jun 27 2013	Joint appendix filed. (Statement of costs filed)
Jun 27 2013	Brief of petitioner Daimler AG filed.
Jul 2 2013	Brief amici curiae of Alliance of Automobile Manufcturers, Inc., et al. filed.
Jul 3 2013	Brief amicus curiae of Professor Lea Brilmayer filed.
Jul 3 2013	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
Jul 3 2013	Brief amici curiae of New England Legal Foundation, et al. filed.
Jul 5 2013	Brief amicus curiae of the United States filed.
Jul 5 2013	Brief amici curiae of Economiesuisse, at al. filed.
Jul 5 2013	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Jul 5 2013	Brief amicus curiae of Atlantic Legal Foundation filed.
Jul 5 2013	Brief amici curiae of Viega GmbH & Co., et al. filed.
Jul 22 2013	CIRCULATED.
Jul 23 2013	SET FOR ARGUMENT on Tuesday, October 15, 2013.
Aug 9 2013	Record received from the U.S.C.A. Ninth Circuit - 1 box.
Aug 9 2013	Record received from U.S.D.C. California Northern District - 1 envelope.
Aug 13 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 19 2013	Brief of respondents Barbara Bauman, et al. filed. (Distributed)
Aug 26 2013	Brief amici curiae of German Institute for Human Rights, et al. filed. (Distributed)
Aug 26 2013	Brief amicus curiae of American Association for Justice filed. (Distributed)
Aug 26 2013	Brief amicus curiae of EarthRights International filed. (Distributed)
Sep 18 2013	Reply of petitioner Daimler AG filed. (Distributed)
Oct 1 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 15 2013	Argued. For petitioner: Thomas H. Dupree, Jr., Washington, D. C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Kevin Russell, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

AND
FEES

11-965

No.

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Daimler AG is a German public stock company that does not manufacture or sell products, own property, or employ workers in the United States. The Ninth Circuit nevertheless held that Daimler AG is subject to *general* personal jurisdiction in California—and can therefore be sued in the State for alleged human-rights violations committed in Argentina by an Argentine subsidiary against Argentine residents—because it has a different, indirect subsidiary that distributes Daimler AG-manufactured vehicles in California. It is undisputed that Daimler AG and its U.S. subsidiary adhere to all the legal requirements necessary to maintain their separate corporate identities.

The question presented is whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Gregory Grieco, Josefina Nunez, Gabriele Nunez, Miriam Nunez, Silvia Nunez, Emilio Guillermo Pesce, Mirta Haydee Arenas, Graciela Gigena, Guillermo Alberto Gigena, Nuria Gigena, Amelia Schiaffo, Elba Leichner, Anunciacion Spaltro de Belmonte, Hector Ratto, Eduardo Olasiregui, Richardo Martin Hoffman, Eduardo Estiville, Alfredo Manuel Martin, Juan Jose Martin, Jose Barreiro, and Alejandro Daer were plaintiffs-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Daimler AG, formerly known as DaimlerChrysler AG, is an *Aktiengesellschaft* or German public stock company. It has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner DaimlerChrysler AG (now known as Daimler AG) respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 644 F.3d 909. Pet. App. 1a. The court of appeals' order denying rehearing and rehearing en banc, along with the opinion of eight judges dissenting from the denial of rehearing en banc, has not yet been published but is available at 2011 WL 5402020. Pet. App. 134a. A now-withdrawn opinion of the court of appeals is reported at 579 F.3d 1088. Pet. App. 46a. The court of appeals' order granting rehearing and withdrawing its earlier opinion is reported at 603 F.3d 1141. Pet. App. 146a. The opinions of the district court are available at 2007 WL 486389, Pet. App. 80a, and 2005 WL 3157472. Pet. App. 94a.

JURISDICTION

The court of appeals filed its opinion on May 18, 2011, and denied a timely petition for rehearing and rehearing en banc on November 9, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

The Ninth Circuit held that Daimler AG, a German company with no facilities or employees in the United States, is subject to general personal jurisdiction in California—and can therefore be sued in the State by foreign plaintiffs for alleged human-rights violations committed in a foreign country by a foreign corporate subsidiary acting to assist a foreign government—because Daimler AG has a different, indirect subsidiary that distributes Daimler AG-manufactured vehicles in California. As recognized by the eight judges who dissented from the Ninth Circuit's refusal to rehear the case en banc, that holding "represents a breathtaking expansion of general personal jurisdiction" that is impossible to reconcile with the decisions of this Court or other circuits and that poses "a gratuitous threat to our nation's economy, foreign relations, and international comity." Pet. App. 145a (O'Scannlain, J., dissenting from denial of rehearing en banc). This Court's review is warranted to clarify the circumstances in which due process permits a court to exercise general personal jurisdiction over a foreign corporation based on a subsidiary's in-state conduct—a question that has produced at least three conflicting approaches among the circuits—and to ensure that all courts are uniformly enforcing the constitutionally mandated restrictions on the exercise of personal jurisdiction.

1. This Court has long recognized that the "Due Process Clause . . . operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984). "Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has 'certain minimum con-

tacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* at 414 (alteration in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Where the requisite "minimum contacts" exist, the exercise of personal jurisdiction over the defendant must also be "reasonable[ ]" in light of factors such as "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985).

"[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Helicopteros*, 466 U.S. at 414 n.8. Where a cause of action does not arise out of a defendant's forum-state connections, a court may still be able to exercise "general jurisdiction" over a corporation if "the continuous corporate operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (internal quotation marks and alterations omitted). "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home," such as its "domicile, place of incorporation, and principal place of business." *Id.* at 2853-54.

The personal-jurisdiction inquiry is generally the same whether a case is filed in state or federal court.

In the absence of a specialized federal statute governing personal jurisdiction, a federal district court looks to whether the defendant is subject to personal jurisdiction in the State in which the court is located. Fed. R. Civ. P. 4(k)(1)(A).

2. Respondents are 22 Argentine residents who allege that they, or their relatives, were subject to human-rights abuses in the 1970s while employed in Argentina by Mercedes-Benz Argentina, a subsidiary of Daimler AG's predecessor-in-interest. Pet. App. 2a-3a. According to respondents, Mercedes-Benz Argentina "collaborated with the Argentine government to kidnap, detain, torture, or kill [respondents] or their relatives during Argentina's military regime of 1976 to 1983, known as the 'Dirty War.'" *Id.* at 81a. Respondents filed suit against Daimler AG in the Northern District of California under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 note. They also purported to bring claims "under the laws of California . . . and Argentina." First Amended Compl. ¶ 79, D.E. 11; *see also id.* ¶ 57(k).

Daimler AG is a German *Aktiengesellschaft*, or public stock company, that manufactures Mercedes-Benz vehicles in Germany; it does not own property, manufacture or sell products, or employ workers in the United States. Pet. App. 95a. Respondents nevertheless alleged that Daimler AG was subject to general personal jurisdiction in California because Mercedes-Benz USA LLC ("MBUSA"), an indirect subsidiary of Daimler AG that is incorporated in Delaware, distributes Daimler AG-manufactured vehicles to dealerships in California. *Id.* at 7a-8a. Pursuant to a General Distributor Agreement between the companies—which expressly disavows any agency relationship—MBUSA takes title to the vehi-

cles in Germany and then distributes them in California and other States pursuant to general policies established by Daimler AG. *Id.* at 8a-15a.

Respondents did not dispute that Daimler AG and MBUSA adhere to all the requirements of their separate corporate identities. *See* Pet. App. 114a ("Plaintiffs do not seek to demonstrate that MBUSA is an alter ego of [Daimler AG]."). They instead asserted that Daimler AG was subject to general personal jurisdiction in California, and therefore could be sued on causes of action with no relationship to the State, because MBUSA was acting as Daimler AG's "agent" in California. *Id.* at 113a. In response, Daimler AG argued that Ninth Circuit authority recognizing "agency" as a basis for imputing a subsidiary's jurisdictional contacts to a parent corporation is inconsistent with this Court's precedent and that, in any event, MBUSA was not the agent of Daimler AG. *See, e.g.*, Reply Mem. in Support Mtn. to Dismiss at 6 n.2, D.E. 60.

After permitting "jurisdictional discovery . . . on whether an agency relationship exists between [Daimler AG] and MBUSA and the ability of [respondents] to pursue their claims in Germany . . . or Argentina," the district court dismissed respondents' complaint for lack of personal jurisdiction. Pet. App. 132a-33a; *see also id.* at 93a. The court concluded that MBUSA was not an "agent" of Daimler AG for purposes of personal jurisdiction because MBUSA's services were not "sufficiently important" to Daimler AG: "evidence that alternative automobile distribution channels were used by [Daimler AG] in the past and are currently used by Toyota show that distribution is not a task that but for the existence of the subsidiary, [Daimler AG] would have to undertake itself." *Id.* at 83a, 84a (internal quotation marks

omitted). The court also determined that the exercise of personal jurisdiction over Daimler AG would be constitutionally "unreasonable" because, among other reasons, "both Argentina and Germany provide plaintiffs with an adequate alternative forum for their claims." *Id.* at 85a.

3. The Ninth Circuit initially affirmed in a 2-1 decision, over a dissent by Judge Reinhardt. Pet. App. 61a. Relying on then-settled Ninth Circuit precedent, the court of appeals held that MBUSA was not Daimler AG's "agent" because respondents had "failed to make a prima facie showing that [Daimler AG] would undertake to perform substantially similar services in the absence of MBUSA" and because Daimler AG did not exercise "pervasive and continual control" over MBUSA. *Id.* at 58a.

Nine months later, however, the Ninth Circuit granted respondents' petition for rehearing (without permitting Daimler AG to respond) and vacated its opinion. Pet. App. 146a. The court of appeals initially set the case for reargument, but thereafter canceled the argument and issued a new opinion. *Id.* at 1a. That opinion, authored by Judge Reinhardt, reached the opposite conclusion and held that Daimler AG in fact was subject to general personal jurisdiction in California because MBUSA was its "agent." *Id.* at 3a.

The Ninth Circuit explained that, under its "controlling law, if one of two *separate* tests is satisfied, we may find the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum." Pet. App. 21a. "The first test," the court stated, "is the 'alter ego' test," which is "predicated upon a showing

of parental *control* over the subsidiary." *Id.* "The second test . . . is the 'agency' test," which "is predicated upon a showing of the *special importance* of the services performed by the subsidiary." *Id.*

Because respondents had not alleged that MBUSA and Daimler AG were alter egos of each other, the Ninth Circuit turned to the agency test and applied a two-pronged standard for determining whether an agency relationship existed between the two corporations for purposes of personal jurisdiction. Pet. App. 21a-22a. In so doing, the court acknowledged that it was invoking a unique definition of "agency" that it applies only in the jurisdictional setting, and that it was "not examining the rules governing the test for vicarious liability, or for holding [Daimler AG] financially liable for the actions of MBUSA." *Id.* at 28a.

The Ninth Circuit first asked whether "the services provided by MBUSA [were] sufficiently important to [Daimler AG] that, if MBUSA went out of business, [Daimler AG] would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative." Pet. App. 22a. The court concluded that this element of the agency test was met because the "services that MBUSA currently performs are sufficiently important to [Daimler AG] that they would almost certainly be performed by other means if MBUSA did not exist." *Id.* at 25a.

The Ninth Circuit next inquired whether Daimler AG had the "right to control" MBUSA's operations. Pet. App. 26a. The court of appeals explained that "actual control was not necessary"—while acknowledging that there were "cases that might be read to require a more stringent showing of control."

Id. at 22a n.12, 27a. Relying primarily on a distribution agreement that gives Daimler AG contractual rights against MBUSA but leaves MBUSA in charge of its day-to-day operations, the court concluded that Daimler AG "had the right to substantially control MBUSA's activities." *Id.* at 30a.

Finally, the Ninth Circuit concluded that exercising jurisdiction over Daimler AG was reasonable. Pet. App. 43a. The court acknowledged that "German courts have expressed some concern that this suit may impinge upon German sovereignty," but stated that it "d[id] not agree" with those concerns. *Id.* at 34a. The court determined that neither Argentina nor Germany was an "adequate forum," crediting respondents' arguments that their claims would be time-barred in those jurisdictions and questioning the integrity of Argentina's judicial system. *Id.* at 38a, 40a; *see also id.* at 39a n.18. Moreover, according to the Ninth Circuit, *all* "American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses." *Id.* at 36a. The court therefore concluded that it would "comport[ ] with fair play and substantial justice" for a federal court in California to adjudicate this dispute between foreign plaintiffs and a foreign defendant based on alleged foreign conduct committed by a foreign subsidiary of that defendant's corporate predecessor more than 30 years ago. *Id.* at 41a.

4. Daimler AG petitioned for rehearing and rehearing en banc. Despite this Court's intervening decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, the Ninth Circuit denied the petition, over a dissent authored by Judge O'Scannlain and joined by seven other judges. Pet. App. 135a. Judge O'Scannlain criticized the Ninth

Circuit for "plac[ing itself] at odds again with the dictates of the Supreme Court"; "perpetuat[ing] a split with at least six of [its] sister circuits"; and "reject[ing] respect for corporate separateness, a well-established 'principle of corporate law deeply ingrained in our economic and legal systems.'" *Id.* at 136a, 141a (quoting *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)). Judge O'Scannlain also expressed concern that the Ninth Circuit's decision could "have unpredictable effects on foreign policy and international comity," as well as on "our nation's economy," by, for example, inducing foreign countries to "enact[ ] retaliatory jurisdictional laws" to reach American corporations with foreign subsidiaries. *Id.* at 144a, 145a (internal quotation marks omitted). The court's "holding," Judge O'Scannlain declared, "is an affront to due process." *Id.* at 135a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision vastly expands the circumstances in which general personal jurisdiction can be exercised over a foreign corporation based solely on the forum-state contacts of a corporate subsidiary. In so doing, the decision deepens an already longstanding split among the circuits, which have adopted at least three different tests for determining whether due process permits a court to exercise personal jurisdiction over a defendant by imputing the jurisdictional contacts of a subsidiary corporation to an out-of-state parent. The Ninth Circuit's holding is also at odds with the principles of fundamental fairness and respect for corporate separateness that animate this Court's personal-jurisdiction jurisprudence. Moreover, the Ninth Circuit's dramatic extension of American courts' reach over foreign corporations jeopardizes the United States' international

relations, as well as the ability of American companies to transact business overseas, because, among other things, it encourages foreign countries to apply similarly expansive jurisdictional rules to American corporations with foreign subsidiaries.

As this Court has emphasized, "the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted). That predictability will never be achieved, however, as long as the lower courts remain divided regarding the due process requirements for imputing a subsidiary's jurisdictional contacts to a corporate parent—and as long as the Ninth Circuit and other courts continue to disregard the fundamental due process limitations on the exercise of personal jurisdiction. This Court's review is urgently required.

I. THE DECISION BELOW DEEPENS A SPLIT REGARDING THE DUE PROCESS LIMITS ON IMPUTING A SUBSIDIARY'S JURISDICTIONAL CONTACTS TO A PARENT CORPORATION.

The circuits are deeply divided over the circumstances in which due process permits the imputation of the jurisdictional contacts of a corporate subsidiary to an out-of-state parent corporation. Decisions in at least five circuits, including the Fourth, Fifth, Sixth, Seventh, and Eighth, have categorically *rejected* the agency framework applied by the Ninth Circuit below and held that, in order for one corporation's jurisdictional contacts to be imputed to another corporation, the two corporations must be alter egos

of each other that fail to adhere to the requirements of their separate corporate identities. *See, e.g., Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011). Under that jurisdictional framework, a showing of an agency relationship between two corporations is a constitutionally inadequate basis for imputing jurisdictional contacts to an out-of-state defendant.

Even among those circuits that do permit the imputation of jurisdictional contacts upon a showing of "agency," there is substantial disagreement over the minimum due process requirements for establishing an agency relationship for purposes of personal jurisdiction. The First and Eleventh Circuits permit the imputation of jurisdictional contacts between a parent corporation and a subsidiary acting as an agent on its behalf only where the parent and subsidiary are so interrelated that they are not properly considered separate entities—a standard similar in many respects to the alter-ego inquiry undertaken in other circuits. *See, e.g., Miller v. Honda Motor Co.*, 779 F.2d 769, 773 (1st Cir. 1985). In contrast, the Second and Ninth Circuits hold that an agency relationship can be established for jurisdictional purposes whenever the subsidiary is performing services on behalf of the parent corporation that the parent would perform through some other means if the subsidiary were no longer available—a standard that is seemingly met whenever the subsidiary is performing anything but the most trivial and inconsequential services. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000).

This Court should grant review to eliminate the unpredictability and unfairness generated by these incompatible jurisdictional standards.

A. *No Agency Jurisdiction.* The Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have each held that due process prohibits the imputation of a subsidiary's jurisdictional contacts to a parent corporation in the absence of an alter-ego relationship between the two corporations.

In *Viasystems*, for example, the Eighth Circuit rejected a plaintiff's attempt to rely on the Ninth Circuit's "agency" standard to establish general personal jurisdiction over a German company that used an American subsidiary to distribute its products in the United States. 646 F.3d at 596. The plaintiff contended that an "agency relationship should be implied between [the American subsidiary] and [the German parent] because [the American subsidiary] performs services that are 'sufficiently important to [the German parent] that if it did not have a representative to perform them, [the German parent's] own officials would undertake to perform substantially similar services.'" *Id.* (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001) (per curiam)). The Eighth Circuit explained that it was "not free to adopt this 'agency theory' of jurisdiction because it is inconsistent with our precedent," which has "insisted that personal jurisdiction can be based on the activities of [a] nonresident corporation's in-state subsidiary . . . only if the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego." *Id.* (alterations in original; internal quotation marks omitted). Because the German parent and its American subsidiary were not alter egos of each other, "subjecting [the German parent] to general jurisdiction in Missouri [was] not permitted by the Due Process

Clause." *Id.* at 595; *see also Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003) ("a court's assertion of jurisdiction [based on the activities of an out-of-state corporation's in-state subsidiary] is contingent on the ability of the plaintiffs to pierce the corporate veil").

Similarly, in *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000), the Seventh Circuit held that, "[w]here two corporations are in fact separate, permitting the activities of the subsidiary to be used as a basis for personal jurisdiction over the parent violates . . . due process." *Id.* at 944. The court therefore refused to impute the Illinois contacts of a corporate subsidiary to a Canadian parent corporation because the subsidiary "conducted business as a corporate entity distinct from [the parent]," "maintained separate books, records, financial statements, and tax returns," and "observ[ed] all corporate formalities." *Id.* at 945. "[C]onstitutional due process," the Seventh Circuit reasoned, "requires that personal jurisdiction cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary." *Id.* at 943.

The Fifth Circuit has also required an alter-ego relationship to impute the forum-state contacts of a corporate subsidiary to an out-of-state parent. The Fifth Circuit has held that a "court which has jurisdiction over a corporation has jurisdiction over its alter egos." *Jackson v. Tanfoglio Giuseppe, S.R.L.*, 615 F.3d 579, 586 (5th Cir. 2010) (internal quotation marks omitted). "The theory," the court has explained, "is that, because the two corporations (or the corporation and its individual alter ego) are the same

entity, the jurisdictional contacts of one are the jurisdictional contacts of the other for the purposes of the . . . due process analysis." *Id.* (alteration in original; internal quotation marks omitted).

Thus, where an alter-ego relationship does *not* exist, the Fifth Circuit has refused to permit the exercise of personal jurisdiction over an out-of-state corporation based on a subsidiary's in-state contacts. In *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359 (5th Cir. 1990), for example, the court held that an out-of-state defendant could not "be considered the alter ego of its [Louisiana] subsidiaries"—and therefore was not subject to general personal jurisdiction in the State—because the parent company "observe[d] corporate formalities, ma[d]e[ ] its subsidiaries responsible for daily operations including all personnel decisions, and allow[ed] each subsidiary to keep its records and accounts in separate books and file its own state tax return." *Id.* at 1363.

The Fourth and Sixth Circuits have likewise held that an alter-ego relationship is a due process prerequisite to the imputation of jurisdictional contacts from one corporation to another. Each circuit has held that "it is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court." *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008) (internal quotation marks omitted); *see also Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir.) (same), *cert. denied*, 132 S. Ct. 575 (2011).

Applying that standard to facts indistinguishable from those in this case, the Sixth Circuit held that Toyota Motor Corporation Worldwide, a Japanese corporation, was *not* subject to general personal jurisdiction in Ohio based on the forum-state contacts of its U.S. subsidiary, Toyota Motor Sales, U.S.A., Inc., which imported Toyota vehicles into the United States, because the two companies were "not alter egos." *Toyota Motor Corp.*, 545 F.3d at 363. In reaching that conclusion, the court emphasized that the companies "ha[d] separate books, financial records, [and] bank accounts," "file[d] their own taxes," and "ha[d] separate boards of directors and workforces," and that the "[the American subsidiary], not [the Japanese parent], control[led] the distribution of vehicles into the United States." *Id.*

B. *Limited Agency Jurisdiction.* The First and Eleventh Circuits have held that due process permits the imputation of jurisdictional contacts upon a showing of an "agency" relationship between two corporations—but require a plaintiff seeking to establish "agency" to meet a stringent standard similar to the alter-ego test.

In *Miller v. Honda Motor Co.*, 779 F.2d 769, the First Circuit held that it would violate due process to exercise general personal jurisdiction in Massachusetts over Honda Motor Co., a Japanese company, based on the U.S. contacts of its domestic subsidiary, American Honda, which took title to Honda Motor's vehicles in Japan and then distributed them to dealers in Massachusetts and other States. *Id.* at 772-73. Although the First Circuit framed its jurisdictional inquiry as whether "American Honda [was] in fact an agent of its Japanese parent," the court evaluated the existence of an agency relationship by determining whether "the affairs of Honda and American

Honda were . . . so intertwined as to demonstrate that the two corporations are, in reality, a single entity." *Id.* at 772. The First Circuit concluded that "permitting the acquisition of *in personam* jurisdiction over Honda in this case would offend all notions of fair play and due process" because, among other reasons, "the day to day operational decisions of each company are made by separate groups of corporate officers" and "American Honda controls its own advertising and marketing schemes, and the types of goods it feels are appropriate for the American market." *Id.* "[T]here is nothing fraudulent or against public policy," the court emphasized, "in limiting one's liability by the appropriate use of corporate insulation." *Id.* at 773.

Similarly, in *Consolidated Development Corp. v. Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000), the Eleventh Circuit held that it would not comport with due process to exercise general personal jurisdiction over a Canadian corporation where a corporate subsidiary marketed the defendant's products in the United States. *Id.* at 1294. The court explained that, "[f]or [the plaintiff] to persuade us that the district court had general personal jurisdiction over [the Canadian corporation] because of [the subsidiary's] activities in the United States, it would have to show that [the subsidiary's] corporate existence was simply a formality, and that it was merely [the Canadian corporation's] agent." *Id.* at 1293-94. The plaintiff "ha[d] not carried its burden" because the domestic subsidiary had "its own officers and boards of directors, determine[d] its own pricing and marketing practices, [and] ha[d] its own bank accounts[,] offices, and employees." *Id.* at 1294.

C. *Expansive Agency Jurisdiction.* In conflict with both of the preceding standards, the Second and Ninth Circuits have adopted an expansive approach to agency jurisdiction that permits the imputation of jurisdictional contacts whenever a corporate subsidiary is performing "important" services on behalf of the parent—without regard to whether the companies are adhering to the requirements of their legally separate corporate identities.

In *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88—a case arising out of alleged human-rights violations in Nigeria—the Second Circuit held that Dutch and U.K. corporations were subject to general personal jurisdiction in New York because an investor-relations office in the State that was formally part of an American corporate subsidiary "perform[ed] investor relations services on the defendants' behalf." *Id.* at 96. Because the Second Circuit deemed these services to be "sufficiently important to the foreign entit[ies] that the corporation[s] [themselves] would perform equivalent services if no agent were available," it concluded that the New York investor-relations office was an "agent[ ] of the defendants for jurisdictional purposes." *Id.* at 95. The Second Circuit reasoned that these imputed "contacts go well beyond the minimal" and that there was accordingly "nothing in the Due Process Clause [that] preclude[d] New York from exercising jurisdiction over the defendants." *Id.* at 99. The court reached this conclusion even though there was no allegation that the foreign defendants and their domestic affiliate were alter egos of each other.

The Ninth Circuit applies a similarly expansive agency standard that permits a subsidiary's jurisdictional contacts to be imputed to a corporate parent even in the absence of an alter-ego relationship. In

the decision below, the Ninth Circuit held that, although Daimler AG and MBUSA adhere to all the requirements of their separate corporate identities, Daimler AG was subject to general personal jurisdiction in California based on the in-state contacts of MBUSA because "MBUSA was [Daimler AG's] agent . . . for personal jurisdictional purposes." Pet. App. 3a. The court premised this "agency" relationship on its conclusion that "the services provided by MBUSA [were] sufficiently important to [Daimler AG] that, if MBUSA went out of business, [Daimler AG] would continue selling cars in [California] either by selling them itself, or alternatively by selling them through a new representative," as well as its determination that Daimler AG had a "right to control" MBUSA's operations. *Id.* at 22a, 27a. Thus, according to the Ninth Circuit, a domestic subsidiary's jurisdictional contacts can be imputed to a foreign parent whenever the parent would use some other entity—whether an independent contractor, another subsidiary, or its own workforce—to perform the services in question if the subsidiary were no longer available and has the right to control the subsidiary (whether that right is exercised or not).

* * *

The choice among these conflicting due process standards can have an outcome-determinative effect in many cases in which a plaintiff premises general personal jurisdiction over an out-of-state defendant on the forum-state contacts of a subsidiary corporation. In fact, as Judge O'Scannlain recognized, if this case had been brought anywhere other than the Second or Ninth Circuits, it almost certainly would have been dismissed due to the absence of personal jurisdiction over Daimler AG. *See* Pet. App. 143a

(O'Scannlain, J., dissenting from denial of rehearing en banc) ("it is clear that the exercise of jurisdiction found to be proper here would be improper in many other circuits"). In the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, respondents' jurisdictional argument would have been dismissed out of hand because there is no allegation that Daimler AG and MBUSA are alter egos of each other that failed to adhere to the requirements of their separate corporate identities. *See, e.g., Toyota Motor Corp.*, 545 F.3d at 363 (no personal jurisdiction over a foreign automobile manufacturer based on the forum-state contacts of its domestic distributor because the companies were not alter egos of each other). The case would similarly have been dismissed in the First and Eleventh Circuits. Although those circuits nominally recognize an "agency" theory of jurisdiction, they require a showing of corporate interrelatedness akin to an alter-ego relationship to impute jurisdictional contacts based on "agency." *See, e.g., Miller*, 779 F.2d at 772 (no personal jurisdiction over a foreign automobile manufacturer based on the U.S. contacts of its domestic distributor because the companies' affairs were not "so intertwined as to demonstrate that the two corporations [were], in reality, a single entity").

This Court should grant review to ensure that foreign defendants are subject to the same constitutionally based jurisdictional standards wherever they are sued in the United States, and to restore the "predictability" that the Due Process Clause is designed to afford "potential defendants." *Burger King*, 471 U.S. at 472 (internal quotation marks omitted).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

This Court's review is also warranted because the Ninth Circuit's willingness to disregard the corporate form in order to expand the jurisdictional reach of American courts cannot be squared with this Court's precedent.

This Court has repeatedly emphasized that a "'corporation and its stockholders are generally to be treated as separate entities'" and that "the exercise of the control which stock ownership gives to the stockholders" is not a basis for disregarding corporate separateness. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting *Burnet v. Clark*, 287 U.S. 410, 415 (1932) (some internal quotation marks omitted)). Accordingly, the fact that an out-of-state defendant has an in-state subsidiary is insufficient, standing alone, to establish personal jurisdiction over the out-of-state parent. *Cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("[N]or does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary."). "Each [corporation's] contacts with the forum State must be assessed individually." *Id.*; *see also Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction.").

Thus, in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), this Court held that the in-state contacts of a subsidiary corporation that did business in North Carolina were an insufficient basis for that State to exercise personal jurisdiction over an out-of-state parent corporation that itself had no North Carolina contacts. *Id.* at 338.

The Court emphasized that, even though the defendant "dominate[d]" its subsidiary "immediately and completely" "[t]hrough ownership of the entire capital stock and otherwise," "[t]he existence of the [subsidiary] company as a distinct corporate entity [was] . . . in all respects observed." *Id.* at 335. Accordingly, "the corporate separation carefully maintained" could not "be ignored in determining the existence of jurisdiction" over the parent company because the "separation, though perhaps merely formal, was real." *Id.* at 336, 337; *see also id.* at 337 ("we cannot say that for purposes of jurisdiction, the business of the [subsidiary] corporation in North Carolina became the business of the defendant").

The Ninth Circuit's holding that it comports with due process to exercise personal jurisdiction over Daimler AG based on the California contacts of MBUSA cannot be reconciled with *Cannon* or with this Court's later decisions emphasizing the necessity of respecting corporate separateness. Respondents have never contended that Daimler AG and MBUSA disregard the requirements of their separate corporate identities. Nor could they plausibly do so. Like the two affiliated corporations in *Cannon*, Daimler AG and MBUSA are legally distinct entities: They have separate boards of directors and employees, separate officers, and separate books and records, and each corporation is responsible for its own day-to-day decision-making. *See* Decl. of Peter Waskönig ¶ 8, D.E. 38. In the absence of those imputed contacts, Daimler AG—a German company that owns no property, sells no vehicles, and employs no workers in California—cannot "fairly [be] regarded as at home" in the State. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011); *see also id.* at 2851 ("A court may assert gen-

eral jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.").

The Ninth Circuit's contrary conclusion is likely attributable, at least in part, to the absence of a decision from this Court squarely addressing the imputation of jurisdictional contacts since *Cannon* was decided nearly ninety years ago. In *Goodyear*, this Court *declined* to address the respondents' belated assertion of "a 'single enterprise' theory," which "urge[d] disregard of petitioners' discrete status as subsidiaries and treatment of all Goodyear entities as a 'unitary business.'" 131 S. Ct. at 2857. While the Court did not consider the merits of that argument, it did suggest, consistent with *Cannon*, that the imputation of jurisdictional contacts between two affiliated corporations is appropriate only where the corporations have failed to adhere to the requirements of their separate corporate identities. *See id.* ("merging parent and subsidiary for jurisdictional purposes requires an inquiry 'comparable to the corporate law question of piercing the corporate veil'") (quoting Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 14, 29-30 (1986)). This case affords the Court the opportunity to eliminate lower courts' lingering confusion about this basic due process constraint on the exercise of personal jurisdiction.

The Ninth Circuit's holding also conflicts with this Court's decisions in a second respect. This Court has held that, even where a defendant has minimum contacts with a forum, due process still requires that the exercise of jurisdiction over the defendant be

"reasonable[ ]." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *see also Burger King*, 471 U.S. at 477-78 ("minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities"). Thus, in *Asahi*, this Court held that it would be constitutionally unreasonable for California to exercise personal jurisdiction to adjudicate an indemnity claim between a Taiwanese and a Japanese company because the requirement to litigate in California would impose a substantial burden on the Japanese defendant and California had only a "slight interest[ ]" in this contractual dispute between foreign parties. 480 U.S. at 116.

Here, it would be equally unreasonable for a federal court in California to exercise personal jurisdiction over a German defendant in a case brought by Argentine plaintiffs concerning the alleged conduct in Argentina of one of the defendant's Argentine subsidiaries. The allegations in this case have nothing to do with California (or the United States, for that matter), and litigating in California—which is not home to any of the parties, witnesses, or evidence—would unduly burden Daimler AG. Moreover, "German courts have expressed some concern that this suit may impinge upon German sovereignty"—a concern that the Ninth Circuit simply refused to give credence (Pet. App. 34a)—and, as the district court found, "both Argentina and Germany provide [respondents] with an adequate alternative forum for their claims." *Id.* at 85a. Accordingly, "[c]onsidering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff[s] and the forum State, the exercise of personal jurisdiction by a California court over [Daimler AG]

in this instance would be unreasonable and unfair." *Asahi*, 480 U.S. at 116.

III. The Question Presented Is Exceptionally Important To Foreign And Domestic Corporations Alike.

The Ninth Circuit's far-reaching expansion of the jurisdictional reach of American courts—and the circuits' deepening disagreement regarding the due process limits on the imputation of jurisdictional contacts between corporations—has profound implications for both foreign and domestic corporations, as well as for the international relations of the United States.

This Court has emphasized that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (internal quotation marks omitted). Yet, under the Ninth Circuit's expansive jurisdictional standard, a foreign company will be amenable to suit in the United States on a claim brought by a foreign plaintiff based on foreign conduct as long as the company has a domestic subsidiary that, subject to the parent's right of control, is providing services that the parent would secure "by other means" if the subsidiary were not available. Pet. App. 25a. Under this virtually limitless jurisdictional standard—adopted by the Ninth Circuit for the express purpose of enabling domestic courts to insert themselves into international affairs by "adjudicating and redressing international human rights abuses" (*id.* at 36a)—there are innumerable foreign companies that are now potentially subject to general personal jurisdiction in the United States. *See also id.* at 140a (O'Scannlain, J., dissenting from denial of rehearing en banc) ("Anything a corporation

does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist.").

Nor is the Ninth Circuit's holding limited to the human-rights setting. The Ninth Circuit's boundless notion of general personal jurisdiction would potentially empower California federal courts to hear all manner of disputes involving foreign corporate defendants with U.S. subsidiaries—including, for example, an intellectual property dispute regarding infringement of a European patent in Europe, a dispute involving a contract made and performed in Australia, or a products-liability claim arising out of an accident in Asia.

The inevitable result will be a proliferation of suits in American courts by foreign plaintiffs suing foreign defendants based on foreign conduct. These suits will enmesh American courts in potentially complex international disputes and provide a strong incentive for foreign companies facing the prospect of such litigation to limit their commercial ties to the United States or pull out of the U.S. market altogether. The sweeping jurisdictional reach of the Ninth Circuit's holding may also breed retaliatory rulings by courts of other nations applying similarly capacious jurisdictional standards to American companies with foreign subsidiaries. As Judge O'Scannlain explained in his dissent from the denial of rehearing en banc, "several countries have enacted 'retaliatory jurisdiction laws'" that "'empower national courts to exercise jurisdiction over foreign persons in circumstances where the courts of the foreigner's home state would have asserted jurisdiction.'" Pet. App. 144a (O'Scannlain, J., dissenting

from denial of rehearing en banc) (quoting Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987)). Thus, "as a result of [the Ninth Circuit's] holding . . . , an Italian court might be able to assert jurisdiction over a United States parent corporation based on that court's jurisdiction over a wholly owned Italian subsidiary." *Id.*

The United States itself has emphasized that "excessive assertion of general jurisdiction potentially threatens particular harm to the United States' foreign trade and diplomatic interests." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 12, *Goodyear*, 131 S. Ct. 2846 (2011) (No. 10-76). Overreaching by American courts "may dissuade foreign companies from doing business in the United States, thereby depriving United States consumers of the full benefits of foreign trade," and "dissuade[ ] . . . United States corporation[s] concerned about facing a similar rule abroad . . . from exporting [their] products." *Id.* In addition, "foreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Id.* at 33; *see also* Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 161 ("[T]he broad sweep of American general jurisdiction became problematic when this country began to negotiate with other nations for an international judgments recognition convention under the auspices of the Hague Conference on Private International Law.").

Moreover, even setting aside the astounding breadth of the Ninth Circuit's jurisdictional holding and its potentially serious repercussions, it is im-

portant for all corporations, both foreign and domestic, to operate within a framework of clear, uniformly applied jurisdictional rules that permit "defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (internal quotation marks omitted). The longstanding circuit conflict regarding the due process limitations on the imputation of jurisdictional contacts makes such "assurance" impossible for corporations seeking to determine whether the formation of a new subsidiary will expose them to suit in a State with which they otherwise have no jurisdictional contacts. This uncertainty will inevitably deter valuable economic activity by corporations unwilling to form subsidiaries in new domestic markets without the ability to make a meaningful assessment of the legal risks associated with that commercial expansion.

* * *

The Ninth Circuit's decision "extends the reach of general personal jurisdiction far beyond its breaking point." Pet. App. 135a (O'Scannlain, J., dissenting from denial of rehearing en banc). It exacerbates existing confusion over the constitutional limits on the imputation of jurisdictional contacts, disregards this Court's personal-jurisdiction jurisprudence, and jeopardizes American foreign policy and trade. This Court's review is warranted to restore the uniformly applicable limitations that due process imposes on the exercise of personal jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 6, 2012

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BARBARA BAUMAN; GREGORY GRIECO; JOSEFINA NUNEZ; GABRIELE NUNEZ; MIRIAM NUNEZ; SILVIA NUNEZ; EMILIO GUILLERMO PESCE; MIRTA HAYDEE ARENAS; GRACIELA GIGENA; GUILLERMO ALBERTO GIGENA; NURIA GIGENA; AMELIA SCHIAFFO; ELBA LEICHNER; ANUNCIACION SPALTRO DE BELMONTE; HECTOR RATTO; EDUARDO OLASIREGUI; RICARDO MARTIN HOFFMAN; EDUARDO ESTIVILLE; ALFREDO MANUEL MARTIN; JUAN JOSE MARTIN; JOSE BARREIRO; ALEJANDRO DAER;
Plaintiffs-Appellants,

v.

DAIMLERCHRYSLER CORPORATION; DAIMLERCHRYSLER AG,
Defendants-Appellees.

No. 07-15386

D.C. No. CV-04-00194-RMW

OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted August 6, 2010*
Pasadena, California

Filed May 18, 2011

Before: Mary M. Schroeder, Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

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Matthew James Kemner, Carroll, Burdick & McDonough LLP, San Francisco, California, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

I.

Plaintiffs-Appellants (the "plaintiffs"), twenty-two Argentinian residents,[1] bring suit against DaimlerChrysler Aktiengesellschaft (DCAG) alleging that one of DCAG's subsidiaries, Mercedes-Benz Argenti-

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* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[1] One of the plaintiffs is a resident of Argentina, but a citizen of Chile; the other twenty-one are Argentinian citizens and residents.

na (MBA)[2] collaborated with state security forces to kidnap, detain, torture, and kill the plaintiffs and/or their relatives during Argentina's "Dirty War."[3] Some of the plaintiffs are themselves former employees of MBA and the victims of the kidnapping, detention, and torture, while others are close relatives of MBA workers who were "disappeared" and are presumed to have been murdered. The only question before us is whether the district court had personal jurisdiction over DCAG. The district court granted DCAG's motion to dismiss the case for lack of such jurisdiction. We conclude, however, that DCAG was subject to personal jurisdiction in California through the contacts of its subsidiary Mercedes-Benz USA (MBUSA). We hold that MBUSA was DCAG's agent, at least for personal jurisdictional purposes, and that exercise of personal jurisdiction was reasonable under the circumstances of this case.

II.

A.

The plaintiffs here were workers or relatives of workers at the Gonzalez-Catan plant of Mercedes-Benz Argentina (MBA), a wholly owned-subsidiary of DaimlerChrysler AG's predecessor-in-interest. The plaintiffs allege that MBA sought to brutally punish plant workers whom MBA viewed as union agitators, and that MBA collaborated with the Argentinian military and police forces in doing so. They also al-

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[2] MBA was actually the subsidiary of DCAG's predecessor-in-interest, but neither party contends that there is any relevance to this distinction.

[3] The Dirty War in Argentina began in 1976 when the military overthrew the government of President Isabel Peron and set up a military dictatorship.

lege that MBA had knowledge that the result of this collaboration would be the kidnapping, torture, detention and murder of those workers, and that the plan was implemented, in part, in the following manner. First, MBA labeled the appellants as "subversives" and "agitators" and passed on this information to the state security forces. Second, MBA "had members of the military and police forces stationed within" the Gonzalez-Catan plant. Third, MBA opened the plant to periodic raids by those forces. Fourth, MBA hired Ruben Lavallen, the police station chief who had been behind much of the reign of terror and installed him as Chief of Security, providing legal representation to him when he was "accused of human rights abuses." The plaintiffs further allege that MBA was pleased with the results of the raids and detentions because those actions helped to end a strike, restoring maximum production at the plant.

B.

Plaintiffs brought suit against DCAG in the District Court for the Northern District of California under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victims Protection Act of 1991 ("TVPA"), 106 Stat. 73, note following 28 U.S.C. § 1350. After attempting to serve process at one of DCAG's headquarters in Stuttgart, Germany,[4] they learned that DCAG purported to maintain an operational headquarters in Auburn Hills, Michigan.

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[4] A German trial court authorized the service, but a German appellate court stayed the service so it could determine whether the service of process would infringe on Germany's sovereignty. *See Bauman v. DaimlerChrysler AG* (*Bauman I*), No. C-04-00194 RMW, 2005 WL 3157472, *1 (N.D. Cal. Nov. 22, 2005).

They then attempted to serve DCAG in Michigan. *Bauman v. DaimlerChrysler AG (Bauman I)*, No. C-04-00194 RMW, 2005 WL 3157472, *2 (N.D. Cal. Nov. 22, 2005). DCAG moved to quash service and to dismiss the case for lack of personal jurisdiction. In support of its opposition to these motions, the plaintiffs submitted DCAG's proxy statement which stated that, following the merger of Daimler-Benz and Chrysler, DCAG would "maintain two operational headquarters—one located at the current Chrysler headquarters, 1000 Chrysler Drive, Auburn Hills, Michigan 48326-2766, and one located at the current Daimler-Benz headquarters, Epplestrasse 225, 70567 Stuttgart, Germany." The language referring to dual operational headquarters was repeated four times in the proxy statement. The plaintiffs also submitted a document from DCAG's website, entitled "Investor Questions and Answers."[5] This document

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[5] Although the defendants objected to these two documents as unauthenticated hearsay, the district court dismissed the objection, finding that it was appropriate to consider them at least for the purposes of determining personal jurisdiction. *Bauman I*, 2005 WL 3157472, at *5. The district court refused, however, to further examine some of plaintiffs' evidence, including the percentage of DCAG's worldwide sales that occurred through MBUSA in California and the overlap between the personnel of DCAG and MBUSA, because the court found that this evidence was not "relevant" to whether MBUSA was an agent of DCAG and thus was allegedly beyond the scope of supplemental briefing. *Bauman v. Daimlerchrysler AG* (*Bauman II*), No. 04-00194, 2007 WL 486389, at *2 n.5 (N.D. Cal., Feb. 12, 2007). The plaintiffs had moved to file the evidence under seal in light of DCAG's declaration that this information was confidential, and the district court admitted the evidence into the record when it approved the filing of each of these additional items before its final order. Therefore, it is irrelevant whether the district court should have found that evidence to be "relevant;"

also discussed the "dual operational headquarters" and went on to note that the Co-Chairmen and Co-Chief Executive Officers of DCAG, Jurgen E. Schrempp (former Chairman of DaimlerBenz AG) and Robert J. Eaton (former Chairman and CEO of Chrysler Corporation) both had "offices and staff in both locations." After this evidence was submitted, DCAG withdrew its motion to quash service. *Bauman I*, 2005 WL 3157472, at *2.

C.

As discussed in more detail below, the District Court for the Northern District of California did not hold an evidentiary hearing when it ruled on DCAG's motion to dismiss for lack of personal jurisdiction; therefore, the plaintiffs "need *only* demonstrate facts that *if true* would support jurisdiction over the defendant." *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (per curiam) (quoting *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995) (emphasis added).

DCAG was a German stock company,[6] but according to DCAG, sales of its vehicles in the United

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[Footnote continued from previous page]

the evidence was properly in the record below, and we may consider it in evaluating the agency relationship.

[6] Under the plaintiff-friendly standard at this stage of the litigation, it appears that DCAG had dual operational headquarters in Stuttgart, Germany and Auburn Hills, Michigan. DCAG vigorously disputes this. Another federal court has also found that DCAG has dual headquarters in Germany and in Michigan. *Tracinda Corp. v. DaimlerChrysler AG*, 364 F. Supp. 2d 362, 367 (D. Del. 2005). Because this contested fact is not necessary to our ultimate decision, we do not rely on it. We do note, however, that if we did rely on it, it would add further support to our conclusions.

States "accounted for 1% of the nation's Gross Domestic Product (GDP)." In the annual report DCAG filed with the SEC in 2006, DCAG further admits that "*a significant* portion of our business, primarily in the case of the Mercedes Car Group, depends in part on export sales to the United States." (emphasis added). Mercedes-Benz USA, LLC ("MBUSA") was a Delaware limited liability company with its principal place of business in New Jersey. MBUSA was a wholly-owned subsidiary of the holding company DaimlerChrysler North America Holding Corporation, which was, in turn, a wholly-owned subsidiary of DCAG.[7] MBUSA was the single largest supplier of luxury vehicles to the California market; according to DCAG's figures, MBUSA's sales in California alone accounted for 2.4% of DCAG's total worldwide sales.

MBUSA had a regional office in Costa Mesa, California, a Vehicle Preparation Center in Carson, California, and a Classic Center in Irving, California. *Bauman I*, 2005 WL 3157472, at *10. Because of

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[7] In 2007, DCAG was restructured when it sold its majority interest in the Chrysler Car Group. This is irrelevant for purposes of this case, primarily because DCAG's relation to MBUSA was not affected by the restructuring (except that DCAG is now known as DaimlerBenz AG). In addition, general jurisdiction is determined at the time the suit was filed. *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 422 (9th Cir. 1977). Of course this rule makes sense, otherwise companies could restructure after the filing of large lawsuits for the sole purpose of escaping liability. DCAG does not contend that the restructuring is relevant in any of its filings before this court; in fact, DCAG acknowledges the restructuring, but ascribes no importance to it. Moreover, in its response to interrogatories, DCAG contends that the relevant relationship is the relationship that existed "at the time the complaint was filed."

MBUSA's extensive contacts with California, DCAG does not dispute that MBUSA is subject to general jurisdiction in California. *Id.*

DCAG manufactured Mercedes-Benz motor vehicles and parts primarily at factories in Germany. MBUSA purchased Mercedes-Benz vehicles from DCAG in Germany for distribution in the United States.

Before DCAG created MBUSA, DCAG and its predecessors used two independent distributors to distribute Mercedes-Benz vehicles in the United States. From 1952 to 1957, Max Hoffman was the sole distributor of Mercedes-Benz vehicles; the relationship was terminated "[d]ue to low number of vehicle sales." From 1958-1964, an independent subsidiary of the Studebaker-Packard Corporation was the sole distributor. That company declared bankruptcy in 1964; that same year, the predecessor-in-interest to MBUSA became the exclusive U.S. distributor of Mercedes-Benz vehicles.

The final subsidiary that is relevant to this case is the DaimlerChrysler Corporation (DCC). As the district court noted, when the Chrysler Corporation and Daimler-Benz AG merged, they both became wholly-owned subsidiaries of DCAG. *Bauman I*, 2005 WL 3157472, at *1. At that point, Chrysler Corporation changed its name to DaimlerChrysler Corporation. *Id.*

D.

The relationship between DCAG and MBUSA is governed by a General Distributor Agreement ("the Agreement") which establishes extensive requirements for MBUSA as the general distributor of Mer-

cedes-Benz cars in the U.S.[8] Because the Agreement is the critical legal document that defines DCAG's relationship with MBUSA, we will discuss its provisions at some length.

Sales Figures

According to the Agreement, DCAG and MBUSA agree every year upon a set of quantitative and qualitative objectives, that can include a "minimum or specific number of Vehicles to be sold by [MBUSA] and its Authorized Resellers to end users . . . [and] a minimum or a specific market share in defined vehicle segments" in the United States.

Sales Network

DCAG has extensive oversight over MBUSA's network of Authorized Resellers. MBUSA must "consult" with DCAG before establishing its sales and service network of Authorized Resellers, and before making *any* adjustments to that sales and service network. MBUSA must make "*any* changes or adjustments" to that network requested by DCAG. (emphasis added). MBUSA must receive approval from DCAG before entering into an agreement with any Authorized Reseller. According to the Agreement, "DCAG may, *in its sole discretion*, reject any such proposed appointment." (emphasis added). If DCAG approves of the appointment of the Authorized Reseller, then DCAG also must approve the lo-

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[8] Many of the provisions in the Agreement also apply to MBUSA's Authorized Resellers. Because this case focuses on the relationship between DCAG and MBUSA, we will primarily discuss the provisions as they apply to MBUSA, although in some instances, for clarity's sake, we will discuss the provisions as they apply to MBUSA and its Authorized Resellers.

cation of "each retail sales outlet, showroom and service facility."

Standards

MBUSA must also comply with all Dealership Standards promulgated by DCAG. MBUSA cannot appoint an Authorized Reseller who does not agree to comply with the Dealership Standards. Moreover, DCAG has wide latitude to dictate MBUSA's behavior. MBUSA and its Authorized Resellers "shall comply with [DCAG's] requirements or such other manuals, guidelines or materials as may be from time to time implemented and amended or updated by [DCAG]."

Business Systems

DCAG must approve of the accounting, order, inventory control and warranty claim processing systems used by MBUSA and its Authorized Resellers. DCAG must also approve of the "electronic data storage, transmission and communication system" used by MBUSA and its Authorized Resellers. MBUSA must further observe all of DCAG's "rules, terms and conditions" relating to the use of these business systems.

Customer Information

DCAG dictates what customer information is to be collected by MBUSA. At DCAG's request, MBUSA must provide customer information to DCAG including "financial reports and operating statements, Parts sales and stock reports as well as customer databases and information."

Management Personnel

According to the Agreement, MBUSA must employ a "General Manager, a Parts Manager, a Service Manager, and a Sales Manager." MBUSA cannot

combine these positions without the "prior consent" of DCAG. These employees "shall not, without the prior consent of [DCAG], engage or participate in *operating*, selling or servicing, as the case may be, of any brand of vehicles other than" Mercedes-Benz vehicles. (emphasis added). DCAG must approve the replacements for any key personnel of MBUSA, and MBUSA must appoint such approved replacements within a reasonable time. MBUSA personnel must participate in training offered or organized by DCAG. It is significant also that the Chairman of DCAG, Dieter Zetsche, was simultaneously the Chairman of MBUSA. Zetsche was also the head of the Mercedes Car Group at DCAG. There is at least one other instance of an MBUSA board member also serving on DCAG's board.

Service

DCAG sets the standards and requirements for the vehicle servicing conducted by MBUSA and its Authorized Resellers. The servicing must comply with DCAG's Dealership Standards as well as DCAG's "requirements and other manuals, guidelines, or materials." MBUSA must establish, if DCAG requests, a Service Coordination Center "in conformity with the requirements of [DCAG]." Included in its responsibilities, this Service Coordination Center is to be responsible for "such other tasks as may be from time to time assigned by [DCAG]."

Warranty

DCAG sets the warranty terms applicable to MBUSA. MBUSA may not provide additional warranties without the prior consent of DCAG. MBUSA must allow DCAG to access its facilities to observe the "performance or administration of warranty service."

Vehicle Alteration

MBUSA cannot "alter or modify" any Vehicle without DCAG's "prior approval and then only in the manner [DCAG] authorizes," unless the vehicle has been ordered and the modification specifically requested by an end user.

Technical Publications

MBUSA and its Authorized Resellers must each maintain an "organized library of [DCAG's] technical service publications."

Promotion and Advertising

The Agreement requires MBUSA to "actively market" the Mercedes-Benz vehicles. The Agreement gives DCAG the discretionary power to conduct a yearly review of MBUSA's "comprehensive advertising and marketing plan." If DCAG exercises this right of review, MBUSA cannot pursue the advertising and marketing strategy without the approval of DCAG. MBUSA's marketing strategy, as well as its advertising and promotional materials must be consistent with both the Dealership Standards and DCAG's "brand representation and identification standards;" it must also comply with DCAG's "directives, standards, and processes as may be issued by [DCAG] from time to time." Furthermore, "[u]pon [DCAG's] request, [MBUSA] and its Authorized Resellers shall immediately stop advertising, promotion, or other marketing activities which (*in the sole opinion* of [DCAG]) do not comply" with DCAG's guidelines or standards. (emphasis added). Finally, DCAG can require MBUSA and its Authorized Resellers to participate in dealer advertising programs, associations, and parts merchandising programs.

Signage

MBUSA and its Authorized Resellers must display "appropriate signs and fascia" to identify each facility. DCAG "reserves the right to approve or disapprove of each sign's type, design and size." Moreover, DCAG may implement a signage program whereby DCAG "designs, acquires and arranges for the installation of pre-approved signs" at MBUSA and its Authorized Resellers' facilities. DCAG may also force MBUSA and its Authorized Resellers to sell any signage that they own to DCAG.

Prices

Although the sales *volume* is set yearly by agreement between DCAG and MBUSA, DCAG has the authority to unilaterally set and change *prices*. DCAG simply must "notify" MBUSA "from time to time of the prices and charges for Contract Goods." Even though the Agreement locks MBUSA into a precise sales amount on an annual basis, DCAG may change the prices "at any time, and make the changes effective immediately." DCAG even has the power to force MBUSA to modify the prices that MBUSA charges to its Authorized Resellers for the vehicles MBUSA sells to those Authorized Resellers. Furthermore, MBUSA and its Authorized Resellers must comply with "any pricing policies" established by DCAG. DCAG may also change the "discounts and/or bonuses" it grants to MBUSA with one year's notice.

MBUSA's Authority and Ownership

MBUSA must request the approval of DCAG before it changes its management control or ownership interests, the name or form of its legal entity, or the location of its principal place of business.

Working Capital

MBUSA and its Authorized Resellers must maintain a "working capital level and financing capability" level that is "acceptable" to DCAG. In fact, "[a]t no time may [MBUSA's] working capital dedicated to its operations related to the Contract Goods be less than the amount specified by [DCAG] from time to time."

Customer Satisfaction Policies

MBUSA must participate in any "program and rating scheme with regard to customer satisfaction policies" requested by DCAG.

Other Goods

MBUSA may not manufacture motor vehicles or parts, or sell any vehicles not listed in the Agreement.

Vehicle Homologation

MBUSA must assist DCAG with vehicle distribution and vehicle homologation (the process of ensuring that vehicles comply with applicable regulations).

Sales Numbers

DCAG requires MBUSA to "make all reasonable efforts" to limit the amount of Mercedes-Benz vehicles sold by any Authorized Reseller or group of Resellers to 15% of the total sales of Mercedes-Benz vehicles in the United States.

Trademark

DCAG retains full ownership of the "Mercedes-Benz" trademark.

Related Agreements

DCAG can require MBUSA and its Authorized Resellers to execute "*any agreement* relating to . . . any other matter related to this Agreement in the

form from time to time adopted by [DCAG]" as long as those Agreements are not an "unreasonable burden" on MBUSA.

E.

On November 22, 2005, the district court issued an order "tentatively granting defendant's motion to dismiss" for lack of personal jurisdiction. *Bauman I*, 2005 WL 3157472. The district court applied the two part test for general jurisdiction developed in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984): 1) whether defendant had "systematic and continuous" contacts with California, and 2) whether the assertion of general jurisdiction was reasonable. The district court found that it did not have general jurisdiction over DCAG because DCAG did not have "systematic and continuous contacts" with California; *Bauman I*, 2005 WL 3157472, at *9, the court found that DCAG itself did not have such contacts and, moreover, that the plaintiffs had failed to show that MBUSA was DCAG's agent such that MBUSA's contacts could be imputed to DCAG. *Id.* at *12.

The district court acknowledged that "without MBUSA or another distributor, DCAG would not be able to sell Mercedez-Benz vehicles in California." *Id.* at *12. In deciding that there was no agency relationship, however, the district court relied heavily on its conclusion that "it is not clear that [DCAG] would be required to perform such functions itself to avail itself of the California, luxury-vehicle market." *Id.* The district court admitted that the agency question was a "close question," but found that MBUSA's contacts should not be imputed to the defendant. *Id.*

In its tentative order, the district court also found that personal jurisdiction over DCAG would

not be reasonable, although it made a number of factual findings that caused it to question the correctness of that finding. It found that DCAG had purposefully interjected itself into California by "initiating lawsuits in California courts to challenge the state's clean air laws and to protect DCAG's patents and other business interests." *Id.* at *13. Moreover, it found that the sale of DCAG's vehicles in California "is not an isolated occurrence but arises from the efforts of DCAG to serve the California market." *Id.* The district court recognized that DCAG would be slightly burdened if it was forced to litigate the case in the United States; but, it found that the burden would be "minimal" because DCAG "is a sophisticated, global business, has previously litigated in California, retains permanent counsel in California, and has subsidiaries in California." *Id.* The district court concluded "that California has at least an abstract interest in adjudicating plaintiffs' dispute," but found that California had "little direct interest" in adjudicating the case. *Id.* at *14. The district court decided that the other factors in the reasonableness inquiry were either "difficult to balance" or weighed "slightly" in favor of the plaintiffs or of DCAG. *Id.* at *14, *19. The district court tentatively held that exercise of personal jurisdiction would be unreasonable, however, primarily because it found that Argentina was available as an alternative forum. *Id.* at *15-*17. Because the question was a close one, the district court did not issue a final decision; instead, it allowed for limited jurisdictional discovery regarding the agency relationship between DCAG and MBUSA and the availability of Argentina and Germany as alternative fora. *Id.* at *20.

On February 12, 2007, following the limited jurisdictional discovery, the district court issued its fi-

nal order granting DCAG's motion to dismiss.[9] *Bauman II*, 2007 WL 486389, at *1. The court wrote that it "conclude[d]" that distribution is not a task that DCAG would have to undertake itself, but for the existence of MBUSA, and therefore, the court found that "this mean[t]" that the court lacked personal jurisdiction over DCAG. *Id.* at *2. The court, however, went on to hold that it did "*not need to reach this conclusion*, as DCAG has demonstrated that both Argentina and Germany provide plaintiffs with an adequate alternative forum for their claims."[10] *Id.* (emphasis added).

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[9] The district court did not consider plaintiffs' argument, raised for the first time after the district court's tentative order, that there was nationwide personal jurisdiction over DCAG under Federal Rule of Civil Procedure 4(k)(2). *Bauman II*, 2007 WL 486389, at *6. It also did not consider plaintiffs' argument that if the court found no personal jurisdiction in California, it should transfer the action to the federal district court in Eastern Michigan pursuant to 28 U.S.C. § 1406. *Id.* Because we find that plaintiffs have made a prima facie showing of personal jurisdiction over DCAG, it is unnecessary for us to consider those arguments or to decide whether, as DCAG contends, plaintiffs have waived those arguments by failing to raise them at an earlier stage in the district court proceedings.

[10] The district court included a cursory mention of exhaustion requirements under the TVPA in its reasonableness analysis. *Bauman II*, 2007 WL 486389, at *3. Because we decide, as discussed below, that Argentina is not an "adequate" alternative forum, we need not decide whether the district court properly addressed this issue when it included it as an aside in its reasonableness analysis. Also, because we find that Argentina is not an adequate alternative forum, we hold that DCAG has not shown that the asserted remedy in Argentina is "available, effective, and not futile." *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 832 (9th Cir. 2008) (en banc) (plurality). Moreover, plaintiffs bring claims under the ATS and the TVPA. Even if the plaintiffs had failed to properly exhaust claims, that would affect

The appellants timely appealed, asserting that the district court erred in finding that it lacked jurisdiction over DCAG.

III.

DCAG argued in the district court that the court did not have personal jurisdiction over DCAG or subject matter jurisdiction over plaintiffs' claims. The district court chose to resolve the personal jurisdiction question first. The district court's discretionary decision to do so was proper. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[t]here is no mandatory sequencing of jurisdictional issues . . . [A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85 (1999) (internal quotation marks omitted). Therefore, the only question before us is whether the district court had personal jurisdiction over DCAG.

We review a dismissal for lack of personal jurisdiction *de novo*. *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986). In

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only their TVPA claims, and the district court's brief mention of exhaustion discussed only those claims. *Bauman II*, 2007 WL 486389, at *3. As for the ATS claims, we have held that exhaustion under the ATS is prudential rather than statutory. *Sarei v. Rio Tinto, PLC*, 550 F.3d at 832 n.10. Therefore, "exhaustion under the ATS should be approached consistently with exhaustion principles in other domestic contexts. The defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies." *Id.* at 831-32. Here, DCAG did not plead the exhaustion issue as an affirmative defense before the district court nor does it argue exhaustion before us.

doing so, we apply the following rule: "[w]hen a district court acts on a . . . motion to dismiss [for lack of personal jurisdiction] without holding an evidentiary hearing, the plaintiff need make only a *prima facie* showing of jurisdictional facts to withstand the motion." *Unocal*, 248 F.3d at 922 (emphasis added) (first alteration in original) (quoting *Ballard*, 65 F.3d at 1498). In other words, when as here, the district court did not hold an evidentiary hearing, the plaintiffs "need *only* demonstrate facts that *if true* would support jurisdiction over the defendant." *Id.* (emphases added).

IV.

In evaluating the appropriateness of personal jurisdiction over a nonresident defendant, we ordinarily examine whether such jurisdiction satisfies the "requirements of the applicable state long-arm statute" and "comport[s] with federal due process." *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1404-05 (9th Cir. 1994). Because California "permits the exercise of personal jurisdiction to the full extent permitted by due process," *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000), we need only determine whether jurisdiction over DCAG comports with due process. *See Unocal*, 248 F.3d at 923.

Before doing so, we note that "[t]here are two types of personal jurisdiction: general and specific." *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995). Specific jurisdiction is only relevant if the defendant's "contacts with the forum give rise to the cause of action before the court." *Unocal*, 248 F.3d at 923. By contrast, "when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State," the State is exercising

"general jurisdiction over the defendant." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 415 n.9 (1984) (citations and internal quotation marks omitted). The parties agree that the claims here do not arise out of DCAG's contacts with California, and the plaintiffs press only general jurisdiction over DCAG.

We therefore turn to an examination of whether general jurisdiction over DCAG in California comports with due process; in doing so, we conduct a two-part inquiry. First, we examine whether "the defendant ha[d] the requisite contacts with the forum state to render it subject to the forum's jurisdiction." *Unocal*, 248 F.3d at 925 (quoting *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 (9th Cir.1993)). Second, if it did, we then turn to an examination of whether the assertion of jurisdiction is fair and reasonable. *Id.*

A. Requisite Contacts

In determining the requisite contacts of a defendant, we look to whether its activities in the forum are " 'substantial' or 'continuous and systematic,' even if the cause of action is unrelated to those activities." *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990) (quoting *Data Disc, Inc. v. Systems Tech. Ass'n*, 557 F.2d 1280, 1287 (9th Cir. 1977)). In other words, we ask whether a defendant's "continuous corporate operations within [the] state are . . . so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely distinct from those activities." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1169 (9th Cir. 2006) (quoting *Int'l Shoe Co v. Wash.*, 326 U.S. 310, 318 (1945)) (quotation marks and brackets omitted). Here, there is no doubt that

MBUSA has the requisite contacts.[11] The question is whether MBUSA's extensive contacts with California warrant the exercise of general jurisdiction over DCAG.

Under the controlling law, if one of two *separate* tests is satisfied, we may find the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum. The first test, not directly at issue here, is the "alter ego" test. It is predicated upon a showing of parental *control* over the subsidiary. The two prongs of the "alter ego" test are as follows:

> (1) that there is such unity of interest and ownership that the separate personalities of the two entities no longer exist and (2) that failure to disregard their separate identities would result in fraud or injustice. The first prong of this test has alternately been stated as requiring a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former.

Unocal, 248 F.3d at 926 (internal citations, quotation marks, and brackets omitted). The second test, which *is* applicable here, is the "agency" test. That test is predicated upon a showing of the *special importance* of the services performed by the subsidiary:

> The agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the

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[11] Both parties agree that courts in California have general jurisdiction over MBUSA.

> foreign corporation that if it did not have *a representative* to perform them, the corporation's own officials would undertake to perform substantially similar services.

Id. at 928 (quoting *Chan*, 39 F.3d at 1405) (emphasis added) (internal quotation marks omitted); *see also Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003). For the agency test, we ask: Are the services provided by MBUSA sufficiently important to DCAG that, if MBUSA went out of business, DCAG would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative? We answer this question in the affirmative. In addition, this test requires the plaintiffs to show an element of control, albeit not as much control as is required to satisfy the "alter ego" test.[12] We conclude that DCAG has more than

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[12] The cases that might be read to require a more stringent showing of control do so only when describing *both* the agency and alter ego tests without differentiating between them. *See e.g.*, *Unocal*, 248 F.3d at 926 ("An *alter ego or agency* relationship is typified by parental control of the subsidiary's internal affairs or daily operations.") (emphasis added); *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980) (per curiam) ("[t]hese facts are insufficient to make [the parent] an *'alter ego' or 'agent'* . . . [because the parent company does not] control[ ] the internal affairs . . . [nor] determine[ ] how [the subsidiary] operates on a daily basis") (emphasis added). The *Unocal* court did not rely on control for its agency analysis; instead it relied only on the sufficiently important test as discussed above. *See id.* at 928. The court merely noted that the level of control exercised by Unocal was not enough to overcome the plaintiffs' *failure* to demonstrate "sufficient importance." *See id.* at 929-30. Here, as discussed further below, the plaintiffs have sufficiently demonstrated the importance of MBUSA's services to DCAG. Moreover, because of DCAG's

enough control to meet the agency test, because DCAG has the right to control nearly every aspect of MBUSA's operations.

Application of the Agency Test

1. Sufficient Importance

Our agency test for personal jurisdiction over a foreign corporation on the basis of its subsidiary's operations has its origins in case law from the Second Circuit. *See Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 423 (9th Cir. 1977) (adopting agency theory of personal jurisdiction, with extensive reliance on case law from the Second Circuit). The purpose of examining sufficient importance is to determine whether the actions of the subsidiary can be understood as a manifestation of the parent's presence. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 318 (1945); *Wells Fargo*, 556 F.2d at 423. Presence is a well-established basis for general jurisdiction: an individual who is physically present in a state is subject to the jurisdiction of its courts on any matter. *Int'l Shoe*, 326 U.S. at 316 (1945).

Our starting point for the sufficient importance prong is that a subsidiary acts as an agent if the parent would undertake to perform the services itself *if it had no representative at all* to perform them. *Un-*

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comprehensive right to control MBUSA's operations, it is clear that this relationship easily meets the agency test, and thus we need not define the precise degree of control required to meet that test or establish any particular method for determining its existence. We prefer to follow the traditional case-by-case common law method for refining these questions in the future. *See, e.g., Wells Fargo*, 556 F.2d at 426 ("[I]t must be cautioned that questions of personal jurisdiction admit of no simple solutions" and often "must be decided on a case-by-case basis.").

ocal, 248 F.3d at 928 (finding agency if the services are "sufficiently important to the foreign corporation that if it did not have *a representative* to perform them, the corporation's own officials would undertake to perform substantially similar services") (quoting *Chan*, 39 F.3d at 1405) (emphasis added).[13] As the Second Circuit explained, a court "may assert jurisdiction over a foreign corporation" when it affiliates itself with a local entity whose services "are sufficiently important to the foreign entity that the corporation itself would perform equivalent services *if*

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[13] Admittedly, there is a lack of clarity and consistency in the previous articulations of the "sufficient importance" test. Some language in our *Unocal* opinion would appear to require that without the *particular* subsidiary's services, the parent company would have to undertake the agent's activities *itself*, perhaps through the use of its own personnel. *See Unocal*, 248 F.3d at 928 ("[C]ourts have permitted the imputation of contacts where the subsidiary was either established for, or is engaged in, activities that, but for the existence *of the subsidiary*, the parent would have to undertake itself.") (quoting *Chan*, 29 F.3d at 1405 n.9) (emphasis added) (internal quotation marks omitted). This language, taken from a footnote in the *Chan* opinion that quotes a district court opinion from the Eastern District of Pennsylvania, could be read to suggest that as long as the subsidiary's services could be performed equally effectively by an independent contractor, no agency relationship can exist. That is contrary, however, to the main thrust of both the *Unocal* and *Chan* opinions, and such a reading would make little sense in a complex global economy. Companies can delegate most necessary services to other entities to perform on their behalf, but that does not mean that the entities performing those services are not or cannot be agents of the delegating company. Accordingly, we accept the more reasonable statement of the *Unocal* court quoted in the text above, which was drawn from the text of the *Chan* opinion and constitutes a more complete statement of the proposition relied on by those cases; equally important, it is consistent with the Second Circuit's rule.

no agent were available." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (emphasis added).

Selling Mercedes-Benz vehicles is a critical aspect of DCAG's business operations; DCAG's charter defines its goals as the "development, manufacture, and *sales* of products." (emphasis added). When this suit was filed, the United States market accounted for 19% of the sales of Mercedes-Benz vehicles worldwide, and MBUSA's sales in California alone accounted for 2.4% of DCAG's total worldwide sales. DCAG simply could not afford to be without a U.S. distribution system.

The services that MBUSA currently performs are sufficiently important to DCAG that they would almost certainly be performed by other means if MBUSA did not exist, whether by DCAG performing those services itself or by DCAG entering into an agreement with a new subsidiary or a non-subsidiary national distributor for the performance of those services. As we held in *Wells Fargo*, "it is clear that whether the alleged general agent was a subsidiary of the principal or independently owned is irrelevant." 556 F.2d at 423. Independent contractors may be considered representatives, and contracting with an independent contractor to achieve the same end — distributing cars in the United States — means, in practice, obtaining a "representative" to "undertake . . . substantially similar services." *Unocal*, 248 F.3d at 928 (quoting *Chan*, 39 F.3d at 1405).

Therefore, the plaintiffs have established the importance to DCAG of the services performed by MBUSA and met the sufficiently important test, because even if DCAG were to replace MBUSA with an

independent entity, that entity would still be considered a representative for purposes of that test.

2. Control

We turn now to an examination of the element of control. As we have stated, *supra*, the principal focus of our agency test for purposes of personal jurisdiction is the importance of the services provided to the parent corporation. In *Unocal*, we conducted a thorough analysis of a potential agency relationship and based our decision solely on the failure to meet the sufficient importance test. *Id.* at 928-31. We then added that control alone was insufficient to overcome that failure.

Control nevertheless plays a role in determining whether personal jurisdiction is established because control is a traditional element of agency under common law principles. DCAG contends that a right to control is not sufficient, and that the parent must actually exercise control over the operations of its subsidiary on a day-to-day basis in order to meet the agency test. This argument is in error because it conflates the agency and alter ego tests. We have previously explained that these two tests are distinct and involve considerations of distinct factors. *Wells Fargo*, 556 F.2d at 425.[14] As explained in the Restatement (Third) of Agency:

> A principal's right to control the agent is a constant across relationships of agency, but

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[14] As discussed above, the alter ego test requires a showing that the "parent controls the subsidiary 'to such a degree as to render the latter the mere instrumentality of the former.' " *Unocal*, 248 F.3d at 926 (quoting *Calvert v. Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1995)). A similar degree of control is not required to establish agency.

> the content or specific meaning of the right varies. Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. *A principal's failure to exercise the right of control does not eliminate it*, nor is it eliminated by physical distance between the agent and principal. . . .

§ 1.01 cmt. c. (emphasis added).

As we recently held, "[t]o form an agency relationship, both the principal and the agent must manifest assent to the principal's *right to control* the agent." *United States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010) (emphasis added). We went on to make clear that actual control was not necessary by noting that a principal must either "actually control[ ]" the agent, *or* the principal and the agent must agree that the principal has the *right* to do so. *Bonds*, 608 F.3d at 506. We can think of no clearer manifestation of assent to the principal's right to control than the comprehensive written agreement between DCAG and MBUSA.[15]

Even at common law, agents may exercise a considerable amount of discretion in performing their functions. *See* Restatement (Third) of Agency § 2.01, cmt. d (2006). A principal has control when it "has *the right* to give interim instructions or directions to the agent once their relationship is established."

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[15] The mere "capacity" to control is not sufficient to establish agency, absent some indication of an agreement that the principal has the right to control the agent. *Bonds*, 608 F.3d at 506. Although that agreement need not be explicit, "there must be at least some manifestation of assent" to the right to control. *Id.* at 507.

§ 1.01 cmt. f (emphasis added). Indeed, the principal need not *exercise* control at all in order to preserve an agency relationship; the relevant inquiry, rather, is whether the principal has the *right* to control. *See, e.g.*, *Bonds*, 608 F.3d at 506; *In re Coupon Clearing Service, Inc.*, 113 F.3d 1091, 1099 (9th Cir. 1997) (holding that "[t]he right to control, rather than its exercise, is sufficient to meet [the agency] standard" under California law).

The Second Circuit's test does not require that "the defendant exercise[ ] direct control over its putative agent." *Wiwa*, 226 F.3d at 95. In fact, the Second Circuit relies on the sufficient importance test without requiring any control. *Id.* We do not go so far, however. For the reasons explained above, it is necessary in this circuit that the principal have the right of control with respect to the agent.

We must remember that we are considering the contours of the test for agency to be applied in the context of personal jurisdiction. We are not examining the rules governing the test for vicarious liability, or for holding DCAG financially liable for the actions of MBUSA. Moreover, when we consider control here, it is as part of a test that primarily considers whether the services are of "sufficient importance." *See Unocal*, 248 F.3d at 928. Outside the context of personal jurisdiction, we do not require a double showing in order to establish an agency relationship: in other circumstances, the tasks to be performed by the agent on behalf of the principal need not be of any special importance. *See, e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1036 (9th Cir. 2003); Restatement (Third) of Agency § 1.01.

3. DCAG's Right to Control

The degree of control that DCAG exercises over MBUSA is more than sufficient for the purpose of establishing personal jurisdiction. To repeat, we must take plaintiffs' alleged facts as true, because plaintiffs need make only a prima facie showing of personal jurisdiction here.

DCAG contends that the General Distributor's Agreement is evidence of an "arms-length" relationship with MBUSA. We do not read the agreement as DCAG appears to. DCAG has the right to control nearly all aspects of MBUSA's operations including: the number of vehicles that MBUSA must sell; the approval of MBUSA's Authorized Resellers, as well as the location of each retail sales outlet, showroom and service facility; the dealership standards that MBUSA must comply with; the business systems that MBUSA uses; the type of customer information that MBUSA must collect; which management personnel are appointed to run MBUSA; which management personnel positions shall exist at MBUSA; the standards and requirements MBUSA must meet for vehicle servicing; whether MBUSA is required to establish a Service Coordination Center, and if so, what tasks that Center will perform; the warranty terms applicable to MBUSA's customers; whether MBUSA can alter or modify any vehicle; what technical service publications MBUSA shall have in its library; the content and scope of MBUSA's advertising and marketing strategy; the type, design and size of MBUSA's signs; the prices that MBUSA must pay to DCAG; the prices that MBUSA may charge to its Authorized Resellers; the working capital level and financing capability level that MBUSA must maintain; what other goods MBUSA may sell or manufacture; whether MBUSA must assist in vehicle homol-

ogation; and the sales numbers of various Authorized Resellers. If that exhaustive list were not enough, DCAG also has the right to require MBUSA to execute "*any agreement relating to . . . any other matter related to this Agreement* in the form from time to time adopted by [DCAG]" as long as those new Agreements are not an "unreasonable burden" on MBUSA. (emphasis added). MBUSA must comply with all of DCAG's current requirements and all future requirements that may be set forth in any future document promulgated by DCAG. DCAG also receives notice about nearly all of MBUSA's actions, including personnel changes, customer information, and marketing strategy.

Because MBUSA's services were sufficiently important to DCAG and because DCAG had the right to substantially control MBUSA's activities, we conclude that MBUSA was DCAG's agent for general jurisdictional purposes.

B. Reasonableness

Because we hold that there is ample evidence of an agency relationship between DCAG and MBUSA, and, thus, that MBUSA's contacts with California may be imputed to DCAG, we now must turn to the second part of our test: whether the assertion of jurisdiction is "reasonable." *See Unocal*, 248 F.3d at 925.

Once plaintiffs have made the requisite showing of minimum contacts in the forum state, "[t]he burden . . . shifts to the defendant to present a *compelling* case that jurisdiction would be unreasonable." *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1198 (9th Cir. 1988) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)) (emphasis added); *see also Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d

1163, 1175 (9th Cir. 2006). We weigh seven factors in resolving this question:

> the extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; the forum state's interest in adjudicating the suit; the most efficient judicial resolution of the dispute; the convenience and effectiveness of relief for the plaintiff; and the existence of an alternative forum.

Sinatra, 854 F.2d at 1198-99. No one factor is dispositive; nor is the answer dictated by whether the majority of factors favors one side or the other. Rather we take into consideration all seven factors and then conduct an overall evaluation of the question. *See Harris Rutsky*, 328 F.3d at 1132.

1. The Extent of Purposeful Interjection

DCAG has purposefully and extensively interjected itself into the California market through MBUSA. The district court found that DCAG had purposely availed itself of the California market, primarily through its design of cars to meet California's air quality standards, its manufacture of a fuel cell for the California Fuel Cell Partnership, and the fact that DCAG built a prototype fuel cell vehicle specifically for the United Parcel Service ("UPS") to use in California. *Bauman I*, 2005 WL 3157472, at *8. The district court also found that DCAG had purposefully interjected itself into California by "initiating lawsuits in California courts to challenge the state's clean air laws and to protect DCAG's patents and other business interests." *Id.* at *13. Moreover, it found that the sale of DCAG's vehicles in California "is not an isolated occurrence but arises from the efforts of DCAG to serve the California market." *Id.*

In addition, we note that DCAG established DaimlerChrysler Research and Technology North America and headquartered the company in "the heart of Silicon Valley." Researchers at the Research and Technology Center in Palo Alto have focused on such products as fuel cell vehicles and vehicle-to-vehicle communication for DCAG brands including Mercedes-Benz.

The district court also found it relevant that DCAG has retained permanent counsel in California and is listed on the Pacific Stock Exchange located in San Francisco. *Bauman I*, 2005 WL 3157472, at *8. DCAG also answered a complaint in a different case in the Northern District of California and filed a cross-complaint after waiving service of process. *See id.* (discussing case). Next, the district court found that the patent and clean air DCAG instituted lawsuits were "likely central to DCAG's business functions." *Id.* at 9. Finally, according to DCAG's own figures, MBUSA's sales in California alone account for 2.4% of DCAG's total worldwide sales.

The first factor, therefore, weighs heavily in favor of "reasonableness," as a corporation that "has continuously and deliberately exploited the [California] market . . . must reasonably anticipate being haled into court there . . . ." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984).

2. The Burden on the Defendant

The burden on the defendant, a large international corporation, to litigate the case in California is not so weighty as to preclude jurisdiction — particularly since "modern advances in communications and transportation have significantly reduced the burden of litigating in another country." *Sinatra*, 854 F.2d at 1199. In 1990, we held that "[i]n this era of fax

machines and discount air travel, requiring the partnership to defend itself in California . . . would not be so unreasonable as to violate due process." *Sher*, 911 F.2d at 1365. Today, for better or for worse, we have moved past that era of fax machines to the current era of electronic-filing in which judges of this court must make a special request if we wish to receive the paper copy of some documents filed with our court. Now, in addition to discount airline travel, parties have the option of conducting video conferences with their clients, and can even, in some instances, conduct video depositions. These technological advances significantly lower the costs, financial and otherwise, of foreign corporations litigating cases in American courts.

Here, the burden on the defendant of producing records and witnesses in California, when the events in question took place in Argentina, would be no greater than if the case were instead litigated in Germany. Moreover, DCAG's official language is English, so it will not be disadvantaged in that respect by litigating in the forum selected by the plaintiffs.

This factor weighs slightly in DCAG's favor, because there is *some* burden in having to litigate in a foreign country. It is not, however, a particularly significant factor, in part because the burden for an international corporation is ordinarily slight, and in part because "the Supreme Court has preferred non-jurisdictional methods of lessening the inconvenience faced by defendants." *Sinatra*, 854 F.2d at 1199.

3. *The Extent of Conflict with Sovereignty of the Defendant's State*

Third, we have held that the extent of the conflict with the sovereignty of the defendant's state "is

not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court." *Id.* (quoting *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985)). Although it is true that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field," *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 115 (1987) (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)), that same consideration will always be present in claims under the ATS and the TVPA.

Although German courts have expressed some concern that this suit may impinge upon German sovereignty, we do not agree. In applying this factor, we examine "the presence or absence of connections to the United States in general, not just to the forum state." *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1489 (9th Cir. 1993). Here, DCAG "has manifested an intent to serve and to benefit from the United States market." *See Sinatra*, 854 F.2d at 1200. Therefore, "sovereignty considerations weigh less heavily than if no United States-based relationships were established." *Id.* When this suit was filed, nearly 50% of DCAG's overall revenue came from the U.S., and sales of DCAG vehicles in the United States accounted for 1% of this country's GDP. It is obvious that this magnitude of sales requires extensive "relationships" in the United States. In addition to its relationship with MBUSA discussed at length above, DCAG was the product of a merger between Chrysler and DaimlerBenz AG. One of the products of that merger, the DaimlerChrysler Corporation (DCC), was one of the Big Three automobile companies in the United States at the time

the suit was filed. Although DCAG insists that it did not have headquarters in the U.S. and that the employee payroll figures that plaintiffs repeatedly cite refer to DCC employees rather than DCAG employees,[16] we need not decide for the purposes of examining this factor whether this is correct. It is clear that DCAG had a strong general presence in the United States through MBUSA and DCC. It is not an infringement on the corporate form to count DCC as a large asset in the United States that DCAG owned. It is irrelevant whether DCC's employees also counted as employees of DCAG.

DCAG has "manifested an intent to serve and to benefit from the United States market." *Sinatra*, 854 F.2d at 1200. It has chosen to place itself at risk of litigation by engaging in extensive business in the United States through the operations of its agent MBUSA and its asset DCC. We do not violate Germany's sovereignty by exercising jurisdiction to hear this suit, even though it involves a German citizen corporation. This factor again weighs only slightly in DCAG's favor.

4. The Forum State's Interest in Adjudicating the Suit

Fourth, although the events at issue did not take place in California and although the plaintiffs are not California residents, the forum state does have a significant interest in adjudicating the suit. California partakes in "the shared interest of the several

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[16] A letter from DCAG Chairman Jurgen Schrempp in a DCAG publication, under the headline "Our *Presence* in North America," said that DCAG had 125,000 employees in the United States, Canada, and Mexico. (emphasis added). The same publication said that DCAG paid $8.2 billion in wages in the United States in 2003.

States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Here, as the claims are predicated upon the ATS and TVPA, that policy is providing a forum to redress violations of international law by defendants who have enough connections with the United States to be brought to trial on our shores, even though the injury is to aliens and occurs outside our borders — "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses. As the Second Circuit held shortly after the turn of the century:

> The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is our business, as such conduct not only violates the standards of international law but also as a consequence violates our domestic law. In the legislative history of the TVPA, Congress noted that universal condemnation of human rights abuses provide[s] scant comfort to the numerous victims of gross violations if they are without a forum to remedy the wrong. This passage supports plaintiffs' contention that in passing the Torture Victim Prevention Act, Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts.

Wiwa, 226 F.3d 88, 106 (2d Cir. 2000) (internal citations and quotation marks omitted).

We agree and have previously cited *Wiwa* with approval for this exact point. *Sarei v. Rio Tinto*, 550 F.3d at 831. The policy of the TVPA is that these "suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business." *Wiwa*, 226 F.3d at 106. In light of the important interest we have recognized, this factor weighs in favor of the reasonableness of exercising personal jurisdiction.

5. The Most Efficient Judicial Resolution of the Dispute

The fifth factor, which examines which forum is most efficient, "involves a comparison of alternative forums." *Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc*, 1 F.3d 848, 852 (9th Cir. 1993). Because we have primarily looked to where the witnesses and evidence are located in order to determine the most efficient forum, *see, e.g.*, *Core-Vent*, 11 F.3d at 1489, there is no difference between the United States and Germany insofar as this factor is concerned. Here, the witnesses and evidence are located primarily in Argentina. Therefore, if that forum were an available alternative forum as discussed below, it would likely be the most efficient. Of course, if a forum is not an available alternative, it cannot be the most efficient in the "comparison of alternative forums." In any event, "this factor is 'no longer weighed heavily given the modern advances in communication and transportation.'" *Harris Rusty*, 328 F.3d at 1133 (quoting *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998)). In the end, the factor is a draw; there is no difference insofar as the efficiency factor is concerned between the United States and Germany, and Argentina is not a truly available forum as discussed below.

6 & 7. The Convenience and Effectiveness of Relief for the Plaintiff; and the Existence of an Alternative Forum

We have traditionally evaluated the sixth and seventh factors together. *See Core-Vent*, 11 F.3d at 1490. The plaintiffs contend that Germany does not recognize human rights suits against corporate defendants and will not allow equitable tolling. Argentinian courts, the plaintiffs assert, provide no means of redress against corporations that collaborated with Argentine security forces in carrying out the Dirty War, and would bar this suit on account of the statute of limitations. Most important for our purposes is whether Argentina would be an adequate forum, as that country, where the events at issue in this lawsuit took place, would be the most natural location in which to litigate the case, were all other factors equal. The plaintiff "bears the burden of proving the unavailability of an alternative forum," *Harris Rutsky*, 328 F.3d at 1133-34, although as mentioned earlier, the overall burden with respect to reasonableness lies with the defendants.

The plaintiffs' arguments that Argentina would not be a fully adequate forum — if it is a forum at all — are persuasive, at this stage of the litigation. A recent Supreme Court case in Argentina has held that human rights civil cases arising out of the Dirty War are subject to a two-year and three-month statute of limitations. *See* Corte Supreme de Justicia de la Nacion [CSJN] [National Supreme Court of Justice], 30/10/2007, "Larrabeiti Yanez, Anatole Alejandro y otro c/ Estado Nacional / proceso de con-

cocimiento," La Ley [L.L.] (2008-F-23) (Arg.).[17] This suit would, for that reason, be barred — which makes Argentina unavailable as an alternative forum.[18] *See Bank of Credit and Commerce Int'l, Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001) ("[A]n adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum.")

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[17] DCAG points to a news article about another Argentinian Supreme Court case involving the prosecution of a government official for acts committed during the Dirty War; the article says that "[t]he statute of limitations is not applied to these *crimes*." *Martinez de Hoz Pardon Quashed By Supreme Court*, Buenos Aires Herald (Apr. 28, 2010) (emphasis added). There is no indication, however, that the law regarding civil cases has changed, and therefore this article, even were we to consider it, is of no significance. In fact, the *Yanez* case cited above recognized that crimes against humanity "have no statute of limitations in the *penal sphere*" but rejected an argument that an "action to claim compensation has no statute of limitations." (emphasis added). Rather, the Court found that the two year and three-month statute of limitations from the age of majority applied to claims for compensation.

[18] Even if it were possible to bring suit in Argentina, which appears unlikely in light of *Yanez*, we cannot say that either "efficient judicial resolution of the dispute" or the "convenience and effectiveness of relief for the plaintiff" would likely be achieved. The Department of State has noted "credible allegations of efforts by members of security forces and others to intimidate the judiciary and witnesses." U.S. Dep't of State, Argentina, Country Reports on Human Rights Practices — 2002, at 8 (Mar. 31, 2003). According to plaintiffs, they have already suffered intimidation for speaking out against Mercedes-Benz Argentina and the security forces, and it is reasonable to conclude that they might continue to be so intimidated if they were to pursue this litigation in Argentina. Therefore, the barriers to effective relief in Argentina for the plaintiffs are formidable.

As to Germany, there is conflicting expert testimony about whether equitable tolling, or an equivalent within the German legal system, would allow the suit to proceed. The answer is not clear; indeed, the district court concluded that "it appears that plaintiffs' claims, which are based on events that occurred in 1976 and 1977, would not *necessarily* be time-barred." *Bauman II*, 2007 WL 486389, at *4 (emphasis added) (citations omitted). DCAG argues that Germany *does* allow human rights suits against corporate defendants, and that plaintiffs are incorrect when they assert a contrary position. Plaintiffs argue, however, that when DCAG was arguing before the German courts about the need to stay the plaintiffs' service of process, DCAG argued that plaintiffs could *not* allege a cause of action in the German courts.

Furthermore, in *Harris Rutsky*, we considered the defendant's amenability to service of process in the alleged alternative forum in deciding whether that forum was truly an alternative. *Harris Rutsky*, 328 F.3d at 1134. Given the concerns discussed above, and the issues that have already arisen with respect to plaintiffs' efforts to serve DCAG in Germany, we cannot say that Germany is an adequate forum such that personal jurisdiction elsewhere should be defeated. Here, DCAG is not readily amenable to service of process in Germany, *see* footnote 4 *supra*; instead, as discussed above, it has vigorously fought the plaintiffs' attempts to serve it. For the reasons stated above, factors six and seven weigh in favor of the plaintiffs with respect to Argentina, but the answer is unclear as to Germany or possibly, because of the burden of proof applicable to the evaluation of this factor, the balance should be struck in favor of Germany.

Even if Argentina and Germany were, as DCAG argues, both adequate fora for redressing any alleged wrongs, the availability of an alternative forum is not the deciding factor in the personal jurisdiction analysis.[19] We are not here considering *forum non conveniens*. "While *forum non conveniens* and personal jurisdiction analyses overlap, they are by no means identical." *Dole Food Co. v. Watts*, 303 F.3d 1104, 1116 (9th Cir. 2002). Rather, the question of an alternate forum is one factor among several that we consider in deciding whether it is *reasonable and fair* to bring DCAG, a foreign corporation with a general agent operating continuously throughout the state of California, before a court in that forum.

Overall Evaluation of the Factors

The question before us is ultimately whether exercising personal jurisdiction over DCAG comports with fair play and substantial justice. We find that it does. As the Second Circuit held in evaluating the exercise of personal jurisdiction over the Royal Dutch/Shell Group:

> While it is true that certain factors normally used to assess the reasonableness of subjection to jurisdiction do favor the defendants (they are foreign corporations that face something of a burden if they litigate here, and the events in question did not occur in New York), litigation in New York City would not

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[19] In fact, we have noted that "[w]hether another reasonable forum exists becomes an issue only when the forum state is shown to be unreasonable." *Sinatra*, 854 F.2d at 1201 (quoting *Corporate Investment Business Brokers v. Melcher*, 824 F.2d 786, 787 (9th Cir. 1987)) (alteration in original). Here, the defendants have not shown that jurisdiction in the forum state is unreasonable.

> represent any great inconvenience to the defendants. The defendants control a vast, wealthy, and far-flung business empire which operates in most parts of the globe. They have a physical presence in the forum state [through their agent], have access to enormous resources, face little or no language barrier, have litigated in this country on previous occasions, have a four-decade long relationship with one of the nation's leading law firms, and are the parent companies of one of America's largest corporations, which has a very significant presence in New York. New York City, furthermore, where the trial would be held, is a major world capital which offers central location, easy access, and extensive facilities of all kinds. We conclude that the inconvenience to the defendants involved in litigating in New York City would not be great and that nothing in the Due Process Clause precludes New York from exercising jurisdiction over the defendants.

Wiwa, 226 F.3d at 99.

Many or all of those considerations apply with equal force in this case. For much the same reasons, we conclude that it is reasonable to exercise jurisdiction over DCAG in California, a state that has itself become a major hub for world commerce and attracts business not only from all over Europe, but from all over Asia as well.

In *Harris Rutsky*, we found that jurisdiction was reasonable even though there was an "obvious alternative forum" and the balance of the seven factors was essentially a wash, "since some of the reasonableness factors weigh in favor of [the defendant], but

others weigh against it." 328 F.3d at 1134; *see also Roth*, 942 F.2d at 625 (holding that jurisdiction was reasonable even though only two reasonableness factors favored plaintiff, while three favored defendant). Here, the defendants present a far less compelling case than did the defendants in *Harris Rutsky*. Most important, DCAG's contacts with California and with the U.S. are *far* more extensive than the defendant's contacts in *Harris Rutsky*. In that case, the defendant had "several California-based relationships, including a contractual one with ASR [the purported agent]. After purposefully seeking out a financially lucrative relationship with ASR, [the defendant] communicated with ASR on a regular basis over a four-year period." *Harris Rutsky*, 328 F.3d at 1134. That was the extent of the contacts in *Harris Rutsky*, and yet we ultimately held that "[g]iven the quantity and quality of the contacts with the forum state, it is not unreasonable for a court in California to exercise personal jurisdiction" over the defendant. *Id.*

In light of DCAG's pervasive contacts with the forum state through MBUSA, including the extensive business operations of that subsidiary, the interest of California in adjudicating important questions of human rights, our substantial doubt as to the adequacy of Argentina as an alternative forum, and the various issues discussed above with respect to Germany, we hold that DCAG "has not met its burden of presenting *a compelling case* that the exercise of jurisdiction would not comport with fair play and substantial justice." *See id.* (emphasis added).

V. Conclusion

At the time this suit was filed, MBUSA's business was sufficiently important to DCAG that without MBUSA or another representative, DCAG would

have performed those services itself. Moreover, DCAG had the right to control to one extent or another nearly every aspect of MBUSA's business. Therefore, we conclude that, at least for the limited purpose of determining general jurisdiction, MBUSA was DCAG's agent.

The Supreme Court "long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests" that fail to take account of reality. *Burger King*, 471 U.S. at 478-79 (quoting *Int'l Shoe*, 326 U.S. at 319). The reality is that in an increasingly complex and globalized economy, international corporations such as DCAG reap enormous profits from the sale of their goods in the United States. The sales are achieved through the use of major distributors, frequently in the form of subsidiaries. Many international companies organize their corporate structure and establish subsidiaries for the sole purpose of obtaining the maximum benefit from the American market. To the ordinary American, and certainly to us, it would seem odd, indeed, if the manufacturer of Mercedes-Benz vehicles, which are sold in California in vast numbers by its American subsidiary, for use on the state's streets and highways, could not be required to appear in the federal courts of that state. Mercedes-Benz cars are ubiquitous in California, and Mercedes-Benz dealerships, required to display the signage mandated by DCAG, have a highly visible presence.

The numbers bear out our perception. At the time that this suit was filed, MBUSA's sales in California alone accounted for 2.4% of DCAG's total worldwide sales. Moreover, when considering burdens on the defendant and the issue of state sovereignty, we cannot overlook the fact that when this suit was filed, nearly 50% of DCAG's overall revenue

came from the United States, and that in order to make this income, DCAG created a wholly-owned subsidiary, MBUSA, to sell Mercedes-Benz vehicles in the United States.

Our test for personal jurisdiction must take these realities into account in determining whether it is reasonable to subject a parent company to the jurisdiction of the courts of this nation on the basis of the acts of its agent. After applying this test, we have no doubt that DCAG is subject to personal jurisdiction in California, and that the exercise of such jurisdiction is not only reasonable, but fair and just. Therefore we reverse and remand for further proceedings consistent with this opinion.[20]

REVERSED and REMANDED.[21]

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[20] To the minimal extent that the opinion contains information received under seal by the district court, the seal is lifted. To the extent that any other information was received under seal, and has not previously been made public, the stipulated protective order shall remain in effect.

[21] This opinion replaces the opinion filed on August 28, 2009 and withdrawn on May 6, 2010.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA BAUMAN; GREGORY GRIECO; JOSEFINA NUNEZ; GABRIELE NUNEZ; MIRIAM NUNEZ; SILVIA NUNEZ; EMILIO GUILLERMO PESCE; MIRTA HAYDEE ARENAS; GRACIELA GIGENA; GUILLERMO ALBERTO GIGENA; NURIA GIGENA; AMELIA SCHIAFFO; ELBA LEICHNER; ANUNCIACION SPALTRO DE BELMONTE; HECTOR RATTO; EDUARDO OLASIREGUI; RICARDO MARTIN HOFFMAN; EDUARDO ESTIVILLE; ALFREDO MANUEL MARTIN; JUAN JOSE MARTIN; JOSE BARREIRO; ALEJANDRO DAER;
Plaintiffs-Appellants,

v.

DAIMLERCHRYSLER CORPORATION; DAIMLERCHRYSLER AG,
Defendant-Appellee.

No. 07-15386

D.C. No. CV-04-00194-RMW

OPINION

Appeal from the United States District Court for the Northern District of California Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
October 21, 2008—San Francisco, California

Filed August 28, 2009

Before: Mary M. Schroeder, Dorothy W. Nelson, and Stephen Reinhardt, Circuit Judges.

Opinion by Judge D.W. Nelson;
Dissent by Judge Reinhardt

COUNSEL

Terry Collingsworth and Natacha Thys, International Rights Advocates, Washington, D.C., for the plaintiffs-appellants.

Matthew J. Kemner, Carroll, Burdick & McDonough LLP, San Francisco, California, for the defendant-appellee.

OPINION

D.W. NELSON, Senior Circuit Judge:

Barbara Bauman and 22 other Argentinian residents filed a lawsuit under the Alien Tort Claims Act against Daimler-Chrysler AG for human rights violations allegedly committed by Mercedes Benz Argentina, its subsidiary, in Argentina during the 1970s military regime. DaimlerChrysler AG filed a successful Rule 12(b)(2) motion, the lawsuit was dismissed for lack of personal jurisdiction, and this appeal ensued. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellants are 23 Argentinian citizens and residents[1] who allege, *inter alia*, that they (or their family members) were kidnapped, detained, or tortured by Argentinian state security forces acting at the direction of their former employer, Mercedes Benz Argentina ("MBA"). Appellants allege that during the military regime that governed Argentina from 1976 to 1983, MBA officials maintained close ties with high-ranking members of the military, and utilized these forces to rid its plant of individuals MBA itself viewed as subversive.

In 2004, appellants filed a complaint in the District Court for the Northern District of California against DaimlerChrysler AG ("DCAG"), MBA's parent company, requesting relief. In April 2005, DCAG filed a Motion to Dismiss for Lack of Personal Jurisdiction in California.

DCAG is a German stock company with its principal seat in Stuttgart, Germany. Mercedes Benz USA, LLC ("MBUSA") is a Delaware limited liability company with its principal place of business in New Jersey. MBUSA is a wholly-owned subsidiary of the DaimerChrysler North America Holding Corporation, a holding company, which, in turn, is a subsidiary of DCAG. MBUSA has two offices in California, and it is undisputed that MBUSA is subject to general jurisdiction in the state.

DCAG manufactures Mercedes Benz motor vehicles and related component parts. MBUSA is not involved in the design or production of the vehicles.

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[1] One appellant is a citizen of Chile, although he resides in Argentina.

Rather, MBUSA is responsible for the marketing and distribution of the vehicles in California, in addition to providing service and sales support. DCAG sells its vehicles, manufactured in Germany, to MBUSA in Germany, where title passes.

Between 1952 and 1957, an independent distributor named Max Hoffman was the sole distributor of Mercedes Benz vehicles in the United States. In 1958, Hoffman was replaced by an independent subsidiary of the Studebaker-Packard Corporation. In 1964, that company went out of business, and distribution was subsequently undertaken by the predecessor-in-interest to MBUSA.

According to the Vice-President of DCAG, DCAG could not distribute vehicles in California without revising its business model, employing a considerable number of individuals, making massive investments in new facilities, and incurring significant tax exposure. DCAG also presented evidence that the most profitable Toyota distributor in the United States, Southeast Toyota Distributors, is a wholly independent, non-subsidiary distributor.

The DCAG-MBUSA relationship is governed by a General Distributor Agreement ("the Agreement"). Under the Agreement, both parties agree upon objectives to be reached by MBUSA prior to each Sales Period. Either company may terminate the Agreement for good cause and with notice to the other party. In the event of termination, all amounts owed by either party would be immediately due, and DCAG would be required to repurchase all vehicles and parts.

DCAG has no control over the product's ultimate destination within the United States. Until 2001, MBUSA independently decided against buying

DCAG G-Class vehicles in California, and those automobiles were therefore sold to an independent and unrelated company.

Upon request by DCAG, MBUSA must provide all information relevant to the financial condition, management, ownership, business practices, and corporate reputation of authorized resellers, as well as copies of all relevant agreements, its comprehensive advertising and marketing plan, and its balance sheets.

MBUSA must also comply with the standards designated by DCAG as binding, although any change requires one year's notice. Marketing strategy and advertising must be consistent with applicable standards, brand representation, and DCAG directives, standards, and processes.

DCAG may reject proposed appointments of Authorized Resellers, must consent before MBUSA management positions can be combined, and must approve the replacement of key personnel. Furthermore, MBUSA must comply with DCAG instructions to modify or alter any of their agreements with Resellers. Offices, sales, and service facilities must be at approved locations and must comply with DCAG requirements. Finally, DCAG reserves the right to approve or disapprove of the type, design, and size of signage.

On November 22, 2005, the District Court issued an order tentatively granting DCAG's motion. The court found that (1) DCAG did not have continuous and systematic contacts via the contacts of MBUSA under agency jurisdiction; and (2) the exercise of jurisdiction would be unreasonable, considering (a) the extent of DCAG's purposeful interjection, (b) the burden on DCAG, (c) conflicts with the sovereignty of

Argentina and Germany, (d) California's interest in adjudicating the dispute, (e) the availability of alternative fora, (f) efficient judicial resolution, and (g) the need to give convenient and effective relief to the plaintiffs.[2]

The court's ruling, however, was tentative and it ordered limited jurisdictional discovery on: (1) whether an agency relationship existed between DCAG and MBUSA, and (2) the ability of the appellants to pursue their claims in Germany or Argentina. In its Supplemental Opposition to the Motion, after discovery, appellants addressed the agency relationship and alternative fora as requested. They also argued that jurisdiction should be conferred upon DCAG because of its contacts with the United States as a whole, pursuant to Fed. R. Civ. P. 4(k)(2), and requested, in the alternative, that the District Court transfer the case to Michigan if it found that it did not have personal jurisdiction over DCAG.

On February 12, 2007, the court concluded that its earlier ruling was correct and granted the motion to dismiss. In its final order, it found that (1) MBUSA was not DCAG's agent for the purpose of conferring general jurisdiction, and (2) both Germany and Argentina provided an adequate forum for appellants' claims. The court did not consider the 4(k)(2) and change of venue arguments because both exceeded the scope of its supplemental briefing order. The appellants timely appealed, asserting that the District Court erred in finding that it lacked jurisdic-

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[2] The court also found that DCAG did not, in and of itself, have "continuous and systematic" contacts with California sufficient to confer general jurisdiction. This finding was not appealed.

tion over DCAG, and alleging various procedural defects in the lower court's ruling.

JURISDICTION

The parties dispute whether there is subject matter jurisdiction over appellants' claim pursuant to the Alien Tort Claims Act and the Torture Victims Protection Act. 28 U.S.C. § 1350. The District Court held that it would resolve the question of personal jurisdiction first. This exercise of discretion was proper. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("There is no mandatory sequencing of jurisdictional issues .... [A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.") (internal quotations omitted); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999).

STANDARD OF REVIEW

This court reviews a dismissal for lack of personal jurisdiction de novo. *Butcher's Union, Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986). The district court's decision to dismiss or transfer a case pursuant to 28 U.S.C. § 1406(a) is reviewed for abuse of discretion. *See King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992).

"It is the plaintiff's burden to establish the court's personal jurisdiction over a defendant." *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). When, as here, the district court " 'rel[ies] on affidavits and discovery materials without holding an evidentiary hearing, dismissal is appropriate only if the plaintiff has not made a prima facie showing of personal jurisdiction.' " *See Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir.

1996) (quoting *Fields v. Sedgwick Assoc. Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986)). "[C]onflicts between the facts contained in the parties' affidavits must be resolved in . . . [plaintiff's] favor.' " *Id.* (internal quotations omitted).

DISCUSSION

"Personal jurisdiction over a nonresident defendant is tested by a two-part analysis." *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th Cir. 1994). "First, the exercise of jurisdiction must satisfy the requirements of the applicable state long-arm statute." *Id.* "Second, the exercise of jurisdiction must comport with federal due process." *Id.* at 1404-05. "[B]ecause California's long arm statute is coextensive with the limits of due process, the court need only consider the requirements of due process." *Synopsys, Inc. v. Ricoh Co.*, 343 F. Supp. 2d 883, 886 (N.D. Cal. 2003).

Due process requires that a nonresident defendant have certain minimum contacts with the forum state so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945). Where the claim does not arise out of a defendant's contacts with the forum, there is no specific jurisdiction. However, "[i]f the defendant's activities in the forum are substantial, continuous and systematic, general jurisdiction is available." *Unocal*, 248 F.3d at 923. "In addition to establishing the requisite contacts, the assertion of jurisdiction must be found reasonable." *In re Phenylpropanolamine Prods. Liab. Litig.*, 344 F. Supp. 2d 686, 690 (W.D. Wash. 2003).

A. AGENCY JURISDICTION

Appellants argue that the continuous and systematic contacts of MBUSA, a subsidiary, should be attributed to DCAG, its parent, because MBUSA was its agent for purposes of personal jurisdiction.

"The existence of a relationship between a parent company and its subsidiaries[, however,] is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries' minimum contacts with the forum." *Unocal*, 248 F.3d at 925. "[A] parent corporation may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is consistent with the parent's investor status." *Id.* at 926 (internal quotations omitted).

1. AGENCY DOCTRINE

In *Unocal*, we described our agency doctrine, by which the contacts of a subsidiary may be imputed to the parent. 248 F.3d at 928-31. "To satisfy the agency test, the plaintiff must make a prima facie showing that the subsidiary represents the parent corporation by performing services 'sufficiently important to the [parent] corporation that if it did not have a representative to perform them, the [parent] . . . would undertake to perform substantially similar services.' " *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003) (quoting *Chan*, 39 F.3d at 1405). The "test permits the imputation of contacts where the subsidiary was 'either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself.' " *Id.* (internal quotations omitted).

The *Unocal* "court distinguished an agency relationship between a parent and its subsidiary from

that of a holding company and its subsidiary, explaining that in the case of a holding company the parent could simply hold *another type* of subsidiary." 248 F.3d at 929 (citing *Gallagher v. Mazda Motor of Am., Inc.*, 781 F. Supp. 1079, 1085 (E.D. Pa. 1992)) (emphasis added). If "the business of the parent is the business of investment," then the subsidiaries do not conduct business as agents. *Id.* (internal citations omitted). "Where, on the other hand, the subsidiaries are created by the parent, for tax or corporate finance purposes, there is no basis for distinguishing between the business of the parent and the business of the subsidiaries.' " *Id.* "The doctrine supports the exercise of jurisdiction when the local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's *own* business." *Sonora*, 83 Cal. App. 4th at 543.

To that end, "[a]ppropriate parental involvement includes: monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures." *Unocal*, 248 F.3d at 926 (internal quotations omitted). "[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability." *Id.* Similarly, consolidated reports are not dispositive. *Id.* at 929.

2. THE ISSUE OF CONTROL

Although appellants later conceded that pervasive control is also necessary to confer agency jurisdiction, the parties initially disputed this issue. This court's decision in *Unocal*, read in isolation, has given rise to some confusion. The beginning of the opin-

ion refers to the need for control. *See, e.g., id.* at 926 ("An alter ego or *agency* relationship is typified by parental *control* of the subsidiary's internal affairs or daily operations.") (emphasis added). The opinion, however, did not discuss control further. *See id.* In *Modesto City Sch. v. Riso Kagaku Corp.*, the District Court for the Eastern District of California found that control was **not** required by *Unocal*. 157 F. Supp. 2d 1128, 1133 (E.D. Cal. 2001) ("Read in isolation, certain phrases suggest that such may be the case; however, read in context and in relation to other Ninth Circuit decisions, the court finds that day-to-day control is not an element of the general agency test in the Ninth Circuit."). Other district courts, citing *Modesto*, have followed suit. *See, e.g., In re W. States Wholesale Natural Gas Litig.*, 605 F. Supp. 2d 1118, 113438 (D. Nev. 2009); *Synopsys*, 343 F. Supp. 2d at 887; *see also Phenylpropanolamine*, 344 F. Supp. 2d at 694 (recognizing the conflict between *Unocal* and *Modesto*).

We write to clarify our law in the area of agency jurisdiction because the *Modesto* court misinterpreted *Unocal*. A determination of agency jurisdiction requires a two-step analysis. First, the parent must exert control that is so pervasive and continual that the subsidiary may be considered an agent or instrumentality of the parent, notwithstanding the maintenance of corporate formalities. Control must be over and above that to be expected as an incident of ownership. Second, the agent-subsidiary must also be sufficiently important to the parent corporation that if it did not have a representative, the parent corporation would undertake to perform substantially similar services. *See Rutsky*, 328 F.3d at 1135.

As an initial matter, a review of our cases reveals that control has always been relevant to an agency

determination. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 419 (9th Cir. 1977) ("[E]stablishment of the requisite *'agency' control* may be even easier when a parent-subsidiary relationship is involved.") (emphasis added); *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980) ("These facts are insufficient to make . . . [the parent] an 'alter ego' or *'agent'* . . . [because] [n]one of the . . . companies *controls* the internal affairs . . . or determines how it operates on a daily basis.") (emphasis added); *Rutsky*, 328 F.3d at 1135 ("Such activity might well be properly characterized as inconsistent with the parent corporation's investor status, and more like *control* over day-to-day activities.") (emphasis added). Thus, before *Unocal* and consistent with it, this court had already indicated that a high degree of control is necessary to confer agency jurisdiction.

Secondly, under common law principles, control is the *sine qua non* of agency. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006) ("A relationship is not one of agency within the common-law definition unless . . . the principal has the right . . . to control the agent's acts.").

Finally, other circuits considering the issue have held that the right to control is of consequence to agency jurisdiction, although the cases vary as to what precise role it plays. *See, e.g., Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 788 (7th Cir. 2003) (Plaintiff "has not demonstrated that . . . [defendant] exerts an unusually high degree of control."); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998) (control as one of several factors); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983) (conflating agency and alter ego jurisdiction but requiring control for both).

3. APPLICATION TO DCAG

We now turn to the facts of this case. In determining whether or not DCAG exerts control that is so pervasive and continual that MBUSA may be considered an agent of DCAG, it is necessary to turn to the terms of the Agreement. The requirements that MBUSA provide detailed information and comply with general marketing standards are consistent with the "monitoring" and "articulation of general policies" permitted under our law. *See Unocal*, 248 F.3d at 926. Furthermore, although DCAG articulates some specific policies for MBUSA, the Agreement was terminable, MBUSA goals are negotiated by both parties, and title to the cars passes in Germany. DCAG has no control over the product's ultimate destination within the United States, and the evidence shows that MBUSA had the power to independently decide against buying DCAG G-Class vehicles in California. This is not pervasive and continual control.

Even if DCAG did exert pervasive control, appellants have also failed to make a prima facie showing that DCAG would undertake to perform substantially similar services in the absence of MBUSA. It is true that the question is close. Although DCAG points to the costs of distribution and the accompanying tax exposure, "[w]here . . . subsidiaries are created by the parent[ ] for tax or corporate finance purposes, there is no basis for distinguishing between the business of the parent and the business of the subsidaries." *See Unocal*, 248 F.3d at 929. DCAG does not appear to own MBUSA solely as an investment; rather, MBUSA markets and sells cars produced by DCAG, thus "perform[ing] a function that is compatible with, and assists . . . [DCAG] in the pursuit of . . . [its] own business." *See Sonora*, 83

Cal. App. 4th at 543. The evidence that DCAG has previously used independent distributors, however, along with Toyota's successful use of autonomous distributors, militates against a finding that without MBUSA, DCAG would personally market and distribute vehicles in California.

Because there is insufficient control and because MBUSA does not serve as DCAG's representative, the contacts of MBUSA cannot be imputed to DCAG.

B. REASONABLENESS OF JURISDICTION

"In addition to establishing the requisite contacts, the assertion of jurisdiction must be found reasonable." *Phenylpropanolamine*, 344 F. Supp. 2d at 690. Because we find that DCAG did not have continuous and systematic contacts sufficient to confer general jurisdiction, we need not reach the question of reasonableness. We also need not reach DCAG's request that some of the evidence bearing on reasonableness be disregarded.

C. PROCEDURAL ISSUES

1. IMPROPER CONVERSION OF DCAG'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION INTO A MOTION TO DISMISS BASED ON FORUM NON CONVENIENS

Appellants assert that the District Court improperly converted the defendant's motion to dismiss for lack of personal jurisdiction into a de facto dismissal on forum non conveniens grounds because its final order discussed only the adequacy of alternative fora.

Appellants mischaracterize the underlying record. Although the final order only discussed the

agency relationship and the alternative fora, the District Court considered the other reasonableness factors in its earlier tentative ruling. Because "[a]n appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment," *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984), the District Court did not convert DCAG's motion into a de facto forum non conveniens motion.

2. REFUSAL TO CONSIDER APPELLANTS' ARGUMENT FOR A FINDING OF PERSONAL JURISDICTION PURSUANT TO FED. R. CIV. P. 4(k)(2) OR ITS REQUEST FOR TRANSFER TO MICHIGAN

The District Court did not address either appellants' assertion that the court had jurisdiction over DCAG pursuant to Fed. R. Civ. P. 4(k)(2), or their request for transfer, because both exceeded the scope of the supplemental briefing order.

According to the Local Court Rules for the Northern District of California, "once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval." N.D. CAL. CIV. R. 73(d); *see also Spacey v. Burgar*, 207 F. Supp. 2d 1037, 1053-54 (C.D. Cal. 2001) (denying plaintiff's motion to reconsider due to newly presented evidence of 4(k)(2) jurisdiction "because . . . [plaintiff] made a deliberate choice not to include the argument in his initial opposition to Defendant's Motion").

Furthermore, if a party first raises an issue "in a motion which the district court refused to consider because it was untimely and in *contravention of local rules*," and does not appeal the district court's procedural ruling, the issue is waived. *Palmer v. IRS*, 116 F.3d 1309, 1312-13 (9th Cir. 1997) (emphasis added).

When the District Court issued its tentative ruling in favor of DCAG, it requested supplemental briefing solely on the agency relationship and the adequacy of alternative fora. The 4(k)(2) argument and request for transfer were, therefore, in contravention of the local rules. *See* N.D. CAL. CIV. R. 3(d). Regardless, because appellants repeated their substantive argument rather than address the procedural ruling in their brief, this argument is waived. *See Palmer*, 116 F.3d at 1312-13.

CONCLUSION

For the foregoing reasons, we find that the District Court did not have personal jurisdiction over DCAG. We therefore AFFIRM the District Court's order.

AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

The majority has formulated a stringent new test for determining whether an agency relationship exists for the purposes of establishing personal jurisdiction. Although the majority's goal of providing some clarity to our rather muddled case law on the subject is laudable, the test it imposes goes too far, requiring a much stronger relationship between parent and subsidiary than is necessary or desirable. The result is to shield foreign corporations from actions in American courts — although they have structured their affairs so as to reap vast profits from American markets — and to deprive plaintiffs, including those who allege grave human rights abuses, of access to justice. Accordingly, I dissent.

I. Minimum Contacts

A.

Under our existing precedent, if one of two tests is satisfied, we may find minimum contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum. The first test, not directly at issue here, is the "alter ego" test. It is predicated upon a showing of *control*:

> [T]he plaintiff must make out a prima facie case (1) that there is such unity of interest and ownership that the separate personalities of the two entities no longer exist and (2) that failure to disregard their separate identities would result in fraud or injustice. The first prong of this test has alternately been stated as requiring a showing that the parent controls the subsidiary to such a de-

> gree as to render the latter the mere instrumentality of the former.

Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001) (internal citations, quotation marks, and brackets omitted). The second test is the "agency" test. It, by contrast, is predicated upon a showing of the *special importance* of the services performed by the subsidiary:

> The agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.

Id. at 928 (quoting *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir. 1994)) (quotation marks omitted); *see also Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003).

The principal focus of the agency test for purposes of personal jurisdiction, therefore, is not "control" — much less "pervasive and continual" control, Maj. Op. at 12008-09 — but rather the relative importance of the services provided to the parent corporation. The cases that might be read to require a stronger showing of control use such language imprecisely, describing *both* the agency and alter ego tests without differentiating between them. *See, e.g.*, *Unocal*, 248 F.3d at 926 ("An alter ego or *agency* relationship is typified by parental *control* of the subsidiary's internal affairs or daily operations.") (emphasis added); *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980) (per

curiam) ("These facts are insufficient to make . . . [the parent] an 'alter ego' or '*agent*' . . . [because] [n]one of the . . . companies *controls* the internal affairs . . . or determines how it operates on a daily basis.") (emphasis added). The majority's "pervasive and continual" control standard compounds this confusion by conflating the alter ego and agency tests, with the result that it is difficult to conceive of a situation in which the subsidiary would be the agent of its parent and not the alter ego.

To be sure, control should play some role — albeit a secondary one — in determining whether personal jurisdiction is established. This is so because control is a traditional element of agency under common law principles.[1] Even at common law, however, agents may exercise a considerable amount of discretion in performing their functions. *See* Restatement (Third) of Agency § 2.01, cmt. d. It is not the case, as the majority holds, that "the parent must *exert* control that is . . . *pervasive and continual* . . . ." Maj. Op. at 12008-09 (emphasis added). Indeed, the principal need not *exercise* control at all in order to preserve an agency relationship; the relevant inquiry, rather, is whether the principal has the *right*

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[1] Even *Modesto*, the district court decision that most emphatically rejects a strict requirement of control under the agency test, does not suggest otherwise. *See Modesto City Schools v. Riso Kagaku Corp.*, 157 F. Supp. 2d 1128, 1134 (E. D. Cal. 2001) ("In so holding this court does not suggest that control is wholly irrelevant to the general agency test. Rather, the court finds that it is not the *sine qua non* of the general agency test."). The majority incorrectly states that *Modesto* held that "control was **not** required by *Unocal*." Maj. Op. at 12008 (emphasis in original). In fact, *Modesto* held that *day-to-day control* was not required by *Unocal* — quite a distinct proposition. *See Modesto*, F. Supp. 2d at 1133.

to control. *See, e.g., In re Coupon Clearing Service, Inc.*, 113 F.3d 1091, 1099 (9th Cir. 2005) ("The *right* to control, rather than its exercise is sufficient to meet this standard."). As explained in the Restatement (Third) of Agency:

> A principal's right to control the agent is a constant across relationships of agency, but the content or specific meaning of the right varies. Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it, nor is it eliminated by physical distance between the agent and principal . . . .

§ 1.01 cmt c (2006).

The level of control required by the majority is excessive, therefore, even for purposes of considering traditional questions of liability. But we should in any event require a *less* stringent showing of control for the limited purpose of establishing personal jurisdiction, for at least two reasons. First, according to the majority "control" is but one part of a two-pronged agency test for the purposes of establishing personal jurisdiction; we must also determine that the services are "sufficiently important." *See Unocal*, 248 F.3d at 928; *Harris Rutsky*, 328 F.3d at 1135. Outside the context of personal jurisdiction, we do not require this double showing in order to establish an agency relationship: the tasks to be performed by the agent on behalf of the principal need not be of any special importance. *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1036 (9th Cir. 2003); Restatement (Third) of Agency § 1.01 (2006). By compounding a

strict control requirement with a requirement that the services be "sufficiently important," the majority has established a test for agency that is significantly *more* stringent for purposes of personal jurisdiction than the test for purposes of liability.

We must remember that here, we are establishing a test for agency in a specialized context. We are not asked to determine the contours of vicarious liability, or to hold DCAG financially liable for the actions of MBUSA. We are deciding one question, only: whether DCAG has sufficient "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotation omitted). Indeed, our tests for agency and alter ego when the issue is jurisdictional "are merely shorthand devices for defining what constitutes traditional notions of fair play and substantial justice for purposes of the due process analysis of *International Shoe* based upon the parent-subsidiary relationship." *In re Telectronics Pacing Systems, Inc.*, 953 F. Supp. 909, 919 (S.D. Ohio 1997). Fairness is not well served in such cases by a stringent test based on a narrow, overly formalistic conception of day-to-day corporate control.

In an increasingly complex and globalized economy, corporations such as DCAG reap enormous profits from the sale of their goods in the United States, achieved through the use of distributors, frequently in the form of subsidiaries. Many multinational companies organize their corporate structure and acquire subsidiaries for the sole purpose of obtaining a maximal benefit from the American market. DCAG, for instance, has earned 45% of its annual revenue from its sales in the United States.

2.4% of its total sales in 2004 were in California. Given these realities, and the continually evolving ways of doing business in an international arena, it is a mistake for the majority to formalize and rigidify our test for personal jurisdiction with an overemphasis on control. As noted by our highly-regarded colleague from New York, Jack Weinstein, nearly three decades ago, such rigid formalism does not map well onto the realities of the business world:

> [D]ifferent control relationships inhere in different multinational structures, and we lose sight of the economic realities if we insist on masking these distinctions behind simplistic formulae. The kind of "day-to-day control", to the extent such a nebulous concept can be made concrete, will vary depending on the kind of subsidiary involved. Thus, while "day-to-day control" might be required to attribute the activities of a relatively autonomous manufacturing subsidiary to its conglomerate parent, this by no means implies such a requirement as to a wholly-owned sales and marketing subsidiary which is the conduit for the sales of a single product in the New York market.

Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F.Supp. 1322, 1343 (E.D.N.Y. 1981) (Weinstein, J.). Our inquiry should be flexible enough to allow us to determine, on the basis of corporate realities rather than formalistic legal rules, whether it is *fair* to bring a parent company into court in the United States.

Under the more flexible approach that I would employ, the degree of control that DCAG exercises over MBUSA would be more than sufficient for the

purposes of establishing personal jurisdiction. The evidence adduced may, in fact, support a finding of control even under the majority's overly stringent test. The following list details, at a minimum, the ways in which DCAG has the power to control MBUSA's activities:

- MBUSA must comply with all DCAG "directives, standards and processes," in its promotion and advertising, which include directives regarding type, design, and size of the signs used by MBUSA.
- MBUSA must submit, at least three months prior to the commencement of each Sales Period, its comprehensive advertising and marketing plan for DCAG's review and approval.
- MBUSA must keep DCAG informed of all marketing, advertising, and promotional activities it implements as well as the results of such activities.
- DCAG owns 100% of the capital stock of MBUSA.
- DCAG retains full ownership of "Mercedes-Benz" trademark.
- MBUSA is required to use the DCAG financial system and maintain records and operating reports based on the standards set forth by DCAG.
- MBUSA must receive approval from DCAG before entering into an agreement with any "Authorized Reseller," and after agreement, must approve the location of "each retail sales outlet, showroom and service facility." "DCAG may, in its sole discretion, reject any such proposed appointment."

- MBUSA must obtain approval from DCAG to replace key personnel (including the CEO).
- DCAG provides the warranty terms for vehicles to consumers.
- MBUSA cannot make alterations to the cars without prior approval, other than alterations ordered by specific customers in connection with vehicles purchased by those customers.
- MBUSA can use only DCAG-supplied parts when repairing or maintaining its own vehicles.
- DCAG can compel MBUSA to engage in dealer advertising programs and parts merchandising programs.
- MBUSA must keep DCAG updated on all promotional materials it uses. MBUSA must adhere to the details of signage and marketing specifications as set out by DCAG, including the type, design, and size of MBUSA's and Authorized Resalers' signage.
- DCAG employees hold senior decision-making positions within the MBUSA Board of Directors.
- MBUSA must collect customer data and furnish periodic reports, upon request from DCAG.
- MBUSA works closely with DCAG to ensure regulatory compliance regarding manufacturing, sales, and legal requirements.

All of these provisions support the conclusion that DCAG is involved in — and has the power to exert sufficient control over — key aspects of MBUSA's operations. If the services that MBUSA provides are

"sufficiently important," — and I turn to that question next — lack of more "control" than DCAG possesses here should be no bar to personal jurisdiction.

B.

This brings me to the remainder of my disagreement with the majority opinion. The evidence that DCAG has previously used independent distributors to facilitate its car sales in the United States, along with Toyota's successful use of autonomous distributors, does not undermine the conclusion that there is an agency relationship between MBUSA and DCAG for purposes of establishing personal jurisdiction.

As an initial matter, the parties dispute whether DCAG would be able to rely successfully on the services of independent distributors to market and sell cars in the United States should it terminate its relationship with MBUSA. Although Toyota has used independent distributors successfully, previous efforts to do so by DCAG's predecessor failed, and it is entirely speculative that future efforts would succeed. DCAG's capacity to sell cars without a wholly-owned subsidiary is a disputed question of fact that should have been resolved in plaintiffs' favor. *See Am. Tel. & Tel. Co.*, 94 F.3d at 588 (in determining whether there is personal jurisdiction over the defendant, "conflicts between the facts contained in the parties' affidavits must be resolved in . . . [plaintiff's] favor").

More important, however, under the agency test, a subsidiary acts as an agent if the parent would undertake to perform the services itself *if it had no representative* at all to perform them. *Unocal*, 248 F.3d at 928 (finding agency if the services are "sufficiently important to the foreign corporation that if it did not have *a representative* to perform them, the corpora-

tion's own officials would undertake to perform substantially similar services") (emphasis added).[2] The law does not require that the parent would undertake to perform the services if they were no longer to be performed by a subsidiary. Rather the question is whether these important services would be performed by "a representative" if the company did not perform them itself. Independent contractors may be considered representatives under certain circumstances,[3] and contracting with such independent dealers to achieve the same end — distributing cars

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[2] Admittedly, there is a lack of clarity and consistency in the previous articulations of the "sufficient importance" test. Some language in *Unocal* appears to require that without the *particular* subsidiary's services, the parent company would undertake the agent's activities *itself*, perhaps through the use of its own personnel. *See Unocal*, 248 F.3d at 928 ("[C]ourts have permitted the imputation of contacts where the subsidiary was 'either established for, or is engaged in, activities that, but for the existence *of the subsidiary*, the parent would have to undertake itself.") (emphasis supplied) (quoting *Chan*, 29 F.3d at 1405 n.9). This language suggests that as long as the subsidiary's services could be performed equally effectively by an independent contractor, no agency relationship can exist. In a complex global economy, this standard makes little sense. Companies can outsource most necessary services to other companies to perform on their behalf; but that does not mean that the subsidiaries performing those services are not or cannot be agents of their parent companies. Accordingly, I accept the more sensible statement of the *Unocal* court set forth on the same page of its opinion and quoted in the text above.

[3] An agent need not necessarily be a subsidiary; an independent corporation or individual may be an agent under certain circumstances, as well. *See, e.g., Wells Fargo* at 419 ("There appears to be no reason why a completely independent, in-state corporation cannot be held to have acted as an agent for another, out-of-state corporation in performing activities giving rise to a cause of action").

in the United States — means, in practice, obtaining a "representative" to "undertak[e] substantially similar services." As the services that MBUSA currently performs are sufficiently important to DCAG that it would undertake to perform them through other means if MBUSA did not exist, whether through a non-subsidiary distributor (i.e., another representative) or by using its own personnel, the agency test has been met.

C.

The parties here agree that *MBUSA's* contacts with California warrant the exercise of general jurisdiction. In other words, its "continuous corporate operations within [the] state are . . . so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely distinct from those activities." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1169 (9th Cir. 2006) (quoting *International Shoe*, 326 U.S. at 318) (internal alterations omitted). Our inquiry, explained above, is as to the fairness of imputing those extensive contacts to DCAG, MBUSA's parent. We should ask: Are the services provided by MBUSA sufficiently important to DCAG that, if MBUSA went out of business, DCAG would undertake to continue selling cars in this vast market itself or alternatively sell its cars through a new representative or representatives? Of lesser importance, is DCAG entitled to control MBUSA to some degree, such that the connection necessary for the exercise of personal jurisdiction has been shown? Undoubtedly, the answer to both of these questions is yes. As Judge Weinstein aptly explained,

> To any layman it would seem absurd that our courts could not obtain jurisdiction over a bil-

> lion dollar multinational which is exploiting the critical New York and American markets to keep its home production going at a huge volume and profit. This perception must have a bearing on our evaluation of fairness. The law ignores the common sense of a situation at the peril of becoming irrelevant as an institution.

Bulova Watch Company, 508 F. Supp. at 1327.[4] To the ordinary American, and certainly, to this judge, it would seem odd, indeed, that the manufacturer of Mercedes-Benz vehicles could not be called into federal court in the state of California. On our streets and highways, Mercedes-Benz cars are ubiquitous, and Mercedes-Benz dealerships, required to display the signage mandated by DCAG, have a highly visible presence. DCAG makes nearly half of its sales in the United States and a hefty number in California itself. To achieve these profits, DCAG has acquired a wholly-owned subsidiary, MBUSA, to sell its cars in

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[4] *See also Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F.Supp. 1525, 1534 (C.D. Cal. 1987) ("[A]s the international economy becomes more interdependent, the formal but artificial separation between a foreign parent corporation and its domestic subsidiary becomes less compelling for purposes of determining personal jurisdiction. Moreover, with the increasing domination of the world economy by multinational corporations, it is appropriate to look to the parent company (i.e., the 'hub of the wheel') when its subsidiaries (i.e., the 'spokes of the wheel') violate substantive rights in foreign countries. The Court agrees with this trend in the law toward greater accountability by foreign corporate entities, and will accordingly look to the 'real' rather than the 'formal' relationship between NEC and its subsidiaries in deciding the jurisdiction issue." (internal citations omitted)).

the United States. Our test for personal jurisdiction should not fail to take these realities into account.

II. Reasonableness

Because I would hold that there is ample evidence of an agency relationship between DCAG and MBUSA, such that MBUSA's contacts with California should be imputed to DCAG, I would move on to consider a question that the majority has not reached: whether the assertion of jurisdiction is "reasonable" in this case.

Because the plaintiffs ("Bauman") have made the requisite showing of minimum contacts in the forum state, "[t]he burden . . . shifts to the defendant to present a compelling case that jurisdiction would be unreasonable." *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1198 (9th Cir. 1988) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)); *see also Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1175 (9th Cir. 2006). We weigh seven factors in resolving this question:

> the extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; the forum state's interest in adjudicating the suit; the most efficient judicial resolution of the dispute; the convenience and effectiveness of relief for the plaintiff; and the existence of an alternative forum.

Sinatra, 854 F.2d at 119899 (citations omitted). These factors, on balance, support the exercise of personal jurisdiction here. As the majority does not address this question, I will not dwell on any factor for long; but I will touch upon each in concluding that it is both reasonable and fair to exercise personal jurisdiction over DCAG.

First, as described at length above, DCAG has purposefully and extensively interjected itself into the California markets through its agent, MBUSA, such that general jurisdiction is warranted. This factor weighs strongly in favor of "reasonableness," as a corporation that "has continuously and deliberately exploited the [California] market . . . must reasonably anticipate being haled into court there . . . ." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984).

Second, the burden on the defendant, a large corporation, to litigate the case in California is not so weighty as to preclude jurisdiction — particularly since "modern advances in communications and transportation have significantly reduced the burden of litigating in another country." *Sinatra*, 854 F.2d at 1199. DCAG has litigated cases in California in the past. *See, e.g., Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008). The burdens to produce records and witnesses in California, when the events in question took place in Argentina, would be no greater than if suit were filed in Germany. This factor, while on balance weighing in DCAG's favor, is not particularly significant.

Third, we have held that the extent of the conflict with the sovereignty of the defendant's state "is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court." *Id.* (quotation omitted). While it is true that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field," *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 115 (1987), the same consideration will always be present in claims involving the Alien Tort Statute ("ATS") and Torture Vic-

tim Prevention Act ("TVPA"). Although German courts have expressed some concern that this suit may impinge upon German sovereignty, I do not agree. DCAG has chosen to place itself at risk of litigation by engaging in extensive business in the United States through the operations of its agent. We do not violate Germany's sovereignty by exercising jurisdiction to hear this suit, even though it involves its citizen corporation. This factor again weighs in DCAG's favor, but not heavily.

Fourth, although the events at issue did not take place in California and although the plaintiffs are not California residents, the forum state does have a significant interest in adjudicating the suit. California partakes in "the shared interest of the several States in furthering fundamental substantive social policies . . . ." *WorldWide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Here, as the claims are predicated upon the ATS and TVPA, that policy is providing a forum for redress of violations of international law by aliens outside our borders who have enough connections with the United States to be brought to trial on our shores — "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). American federal courts — be they in California or any other state — have a strong interest in adjudicating and redressing international human rights abuses. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000) (holding, in the context of *forum non conveniens*, that the TVPA "has . . . communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business."). In light of that important interest, this factor weighs in favor of

the reasonableness of exercising personal jurisdiction.

The fifth, sixth, and seventh factors are, in this case, all influenced by whether the plaintiffs would be able to litigate this suit in Germany or Argentina at all. Bauman contends that Germany does not recognize human rights suits against corporate defendants and will not allow equitable tolling. Argentinian courts, Bauman asserts, provide no means of redress against corporations that collaborated with Argentine security forces in carrying out the Dirty War, and would bar this suit on account of the statute of limitations. Most important for our purposes is whether Argentina would be an adequate forum, as Argentina — where the events at issue in this lawsuit took place — would be, all other factors being equal, the most natural location in which to litigate the case.

Bauman's arguments that Argentina would not be a fully adequate forum — if it is a forum at all — are persuasive. Most important, a recent Supreme Court case in Argentina has concluded that human rights cases arising out of the Dirty War are subject to a two-year statute of limitations. *See Larrabeiti Yanez, Anatole Alejandro vs. National Government*, L. 795. XLI. (ROR) L. 632. XLI. APPEAL. This suit would, for that reason, be barred — which makes Argentina unavailable as an alternate forum. *See Miracle v. N.Y.P. Holdings, Inc.*, 87 F. Supp. 2d 1060, 1071 (D. Haw. 2000). Even if it were possible to bring suit in Argentina, however, which appears unlikely in light of this precedent, I cannot say that either "efficient judicial resolution of the dispute" or the "convenience and effectiveness of relief for the plaintiff" would likely be achieved. The Department of State has noted "credible allegations of efforts by

members of security forces and others to intimidate the judiciary and witnesses." U.S. Dep't of State, Argentina, Country Reports on Human Rights Practices — 2002, at 8 (Mar. 31, 2003). According to plaintiffs, they have already suffered from intimidation for speaking out against Mercedes-Benz Argentina and the security forces, and it is reasonable to conclude that they might continue to be so intimidated if they were to pursue this litigation in Argentina. Although it is clear that production of witnesses and documentary evidence would be easier in Argentina than in the United States, these barriers to effective relief for the plaintiffs are formidable.

As to Germany, there is conflicting expert testimony whether equitable tolling, or an equivalent within the German legal system, would allow the suit to move forward. The answer is not clear; indeed, the district court concluded that "it appears that plaintiffs' claims, which are based on events that occurred in 1976 and 1977, would not *necessarily* be time-barred." *Bauman v. Daimlerchrysler AG*, No. C04 00194 RMW, 2007 WL 486389, at *4 (N.D. Cal. 2007) (emphasis added) (citations omitted). I cannot, on this unsteady legal footing, say that Germany is an adequate forum such that personal jurisdiction elsewhere should be defeated.

Even if Argentina and Germany were, as DCAG argues, both adequate fora for redressing any alleged wrongs, the availability of an alternative forum is not the single deciding factor in the personal jurisdiction analysis. We are not here considering exhaustion or *forum non conveniens*. Rather, the question of an alternate forum is one factor among many that we consider in deciding whether it is *reasonable and fair* to bring DCAG, a foreign corporation with a

general agent operating continually throughout the state of California, before a court in this forum.

In light of DCAG's pervasive contacts with the forum state through its agent MBUSA, as well as the interest of California and the federal courts in adjudicating important questions of human rights, and our substantial doubt as to the adequacy of either Germany or Argentina as an alternative forum, I would hold that on this record it is entirely reasonable and consistent with due process to exercise in personam jurisdiction over DCAG.

III.

I would not have dismissed Bauman's claims for want of personal jurisdiction over DCAG. The majority's overly stringent test for agency in this context erroneously allows foreign corporations that benefit tremendously from American markets to evade judicial process through creative corporate structuring. It denies the plaintiffs, out of hand, a judicial forum and the opportunity to seek redress of grievous wrongs. There is a vast disconnect between the majority's decision today and the foundational principles of fair play and due process that underlie our personal jurisdiction doctrine. For these reasons, I dissent.

APPENDIX C

E-FILED on 2/12/07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BARBARA BAUMAN, et al., Plaintiffs, v. DAIMLERCHRYSLER AG, and DOES 1 through 50, inclusive, Defendants.	No. C-04-00194 RMW ORDER GRANTING DEFENDANT'S MOTION TO DISMISS **[Re Docket Nos. 97, 126]**

By order dated November 22, 2005, the court tentatively granted DaimlerChrysler AG's ("DCAG") motion to dismiss for lack of personal jurisdiction but allowed the plaintiffs to undertake limited jurisdictional discovery. *Bauman v. DaimlerChrysler AG*, 2005 U.S. Dist. Lexis 31929 (N.D. Cal. Nov. 22, 2005).[1] For the reasons set forth below, the court de-

[1] Further citations to this order will be merely to the "Order" and use the pagination of the slip copy.

termines that its tentative ruling that general jurisdiction over DCAG is lacking is correct and grants DCAG's motion to dismiss.

I. BACKGROUND

As set forth in greater detail in this court's prior order, the plaintiffs are twenty-three people, one of whom is a citizen of Chile and the rest of whom are citizens of Argentina, all of whom allege that the entity now known as DaimlerChrysler Argentina ("DC Argentina") collaborated with the Argentine government to kidnap, detain, torture, or kill the plaintiffs or their relatives during Argentina's military regime of 1976 to 1983, known as the "Dirty War." 1st Am. Compl. ¶¶ 1-2. Claiming that DC Argentina is either a division or wholly-owned subsidiary of DCAG, plaintiffs bring this action against DCAG ostensibly under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350,[2] the Torture Victims Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note, Pub. L. 102-256,[3] the United Nations Charter, various international treaties and declarations, federal common law, California common law, and unenumerated California statutes. *Id.* ¶ 57. Plaintiffs' enumerated causes of

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[2] The ATCA does not provide substantive remedies; it is instead a jurisdictional statute. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-14 (2004).

[3] Plaintiffs' TVPA claims are the only ones in this action over which the court would have original jurisdiction under 28 U.S.C. § 1331. This court would not have jurisdiction over any claims in this action this action under 28 U.S.C. § 1332(a) because plaintiffs are all aliens and DCAG is an entity created by German law with (as far as the court can tell on the record before it) a principal place of business in Germany. *See Faysound Ltd. v. United Coconut Chems.*, 878 F.2d 290, 294-95 (9th Cir. 1989).

action are for extrajudicial killing; torture; crimes against humanity; cruel, inhuman, and degrading treatment; wrongful death; and intentional infliction of emotional distress. *Id.* at 18-22.

DCAG moved to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). Order at 4. The parties agreed that plaintiffs' claims do not arise out of or relate to DCAG's purported activity in California, meaning this court lacks specific jurisdiction over DCAG for the purpose of this action. *Id.* Plaintiffs, however, contend that DCAG's contacts with California are so systematic and continuous that this court has general jurisdiction over DCAG; among plaintiffs' arguments in favor of this is that Mercedes-Benz United States, LLC ("MBUSA")—which is wholly owned by a DCAG subsidiary, DaimlerChrysler North America Holding Company ("DCNAHC")—is an agent of DCAG. The court previously concluded in its tentative ruling that the plaintiffs had not shown that DCAG's contacts with California were such that California courts had general jurisdiction over DCAG, but stated that

> before making a final decision, limited jurisdictional discovery will be allowed on whether an agency relationship exists between DCAG and MBUSA and the ability of plaintiffs to pursue their claims in Germany (e.g., is the claim barred by the statute of limitations?) or Argentina (e.g., does Argentine law allow human rights claims against private parties acting in concert with the government?)

Id. at 26.

Plaintiffs' supplemental brief, however, does not so much focus on the questions the court left open but the questions the plaintiffs apparently wish the court had. Plaintiffs address the agency issue, but give scant attention to the issue of adequacy of alternate fora. Plaintiffs also raise for the first time the issue of whether Federal Rule of Civil Procedure 4(k)(2) gives the court personal jurisdiction over DCAG and request, in the event the court finds it does not have personal jurisdiction over DCAG, that the action be transferred to the federal district court in Eastern Michigan under 28 U.S.C. § 1406.

II. ANALYSIS

There is a two-part inquiry for determining whether this court has general jurisdiction over a defendant: (1) whether defendant has "systematic and continuous contacts" with California; and (2) whether the assertion of general jurisdiction is reasonable. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 (9th Cir. 1993).

A. Agency

The first question is whether MBUSA is the agent of DCAG, and therefore whether MBUSA's contacts with California are imputed to DCAG under *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003). In *Harris Rutsky*, the court stated that for jurisdictional purposes, a subsidiary corporation is considered an agent of its parent if "the subsidiary represents the parent corporation by performing services sufficiently important to the parent corporation that if it did not have a representative to perform them, the parent corporation would undertake to perform substan-

tially similar services." *Id.* (quotation marks, brackets, and ellipses omitted).

The parties do not dispute that decades ago, DCAG used Max Hoffman and then the Studebaker-Packard Company as independent distributors for the United States market, and that since 1965, MBUSA has distributed for DCAG in the United States.[4] The parties do dispute, however, the inference to be drawn from this evidence. Plaintiffs argue that the eventual failure of Hoffman and Studebaker shows that either a DCAG subsidiary or DCAG itself must act as the distributor of DCAG's products in the United States. DCAG argues that the previous use of Hoffman and Studebaker, and Toyota's current use of independent distributors show that DCAG's products can be distributed through independent distributors rather than by the activities of DCAG or a subsidiary.

The court concludes that the evidence that alternative automobile distribution channels were used by DCAG in the past and are currently used by Toyota show that distribution is not a task that "but for the existence of the subsidiary, [DCAG] would have to undertake itself." *See id.* This means that DCAG's contacts with California are not "systematic and continuous" and that the court lacks personal jurisdiction over DCAG.[5] However, the court does

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[4] DCAG also presents evidence that Toyota cars are sold in part of the United States by non-subsidiary distributors. Kemner Decl. ¶¶ 3-4.

[5] None of the other evidence plaintiffs present, such as the facts that 2.4 percent of worldwide sales of DCAG's products occur in California, that there is overlap between the personnel of DCAG and MBUSA, or that "DaimlerChrysler Research and Technology North America" is located within this judicial dis-

not need to reach this conclusion, as DCAG has demonstrated that both Argentina and Germany provide plaintiffs with an adequate alternative forum for their claims.

B. Absence of an Alternative Forum

1. Argentina as an Alterative Forum

In their complaint, plaintiffs alleged that "immunity laws" prevent them from pursuing their claims in Argentina. 1st Am. Compl. ¶ 56. However, as DCAG points out, the Supreme Court of Argentina has invalidated certain immunity laws as unconstitutional, and a lower Argentine court has invalidated pardons issued to persons accused of committing serious human rights abuses during the Dirty War. Kemner Decl., Exs. 11, 12. Furthermore, the plaintiffs admit that three of them

> are pressing criminal charges, which were initiated by attorney Ricardo Monner Sans, against various Argentine government officials as well as Mercedes Benz Argentina ("MBA"). These criminal charges were first brought in 2004. Specifically, this criminal case charges defendants with wrongfully associating with the repressive forces of the Dirty-War era military, but is not seeking any compensation. This penal case is still pending.

Id., Ex. 5 at 3. Three other plaintiffs admit they "are pressing" or "involved in pressing" these same charg-

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[Footnote continued from previous page]

trict is relevant to the issue of whether MBUSA is the agent of DCAG under *Harris Rutsky* and is beyond the scope of supplemental briefing allowed by the court.

es, and five others admit participating as witnesses. *Id.* at 4-5. DCAG also presents evidence of a somewhat similar lawsuit against Ford Motor Company in Argentina. In this suit, plaintiffs have alleged that Ford worked with the Argentine military in 1976 to kidnap and torture union leaders from Ford's Argentine plant. *Id.*, Ex. 8.

On the record before the court, Argentina is an adequate alternative forum. A finding that Argentina is an adequate alternative forum precludes plaintiffs from maintaining claims under the TVPA. Section 2(b) of the TVPA provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." That the plaintiffs' recovery in Argentina may be less than it could be in the United States does not render Argentina an inadequate forum. *See Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143-44 (9th Cir. 2001); *see also Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1098 (9th Cir. 2006) (noting recent trend of "more aggressive pursuit of human rights suits in" Argentina).

2. Germany as an Alternative Forum

The parties do not dispute that DCAG would be subject to the jurisdiction of courts in Germany. In its prior order, the court did not reach most of the parties' arguments regarding whether the plaintiffs could pursue claims against DCAG in Germany, but noted that if plaintiffs' claims would be time-barred in a German court, Germany would not "be an alternative forum available to the plaintiffs." Order at 24-25.

a. Equitable Tolling or a Similar Doctrine

In connection with the original briefing on the motion to dismiss, the plaintiffs submitted the declaration of their German legal expert, Kaleck. Docket no. 54, Attach. 1 ("Kaleck Decl."). Kaleck stated:

> . . . German courts do not recognize the equitable tolling principles which the U.S. courts do and which would therefore permit the Argentine plaintiffs to proceed with their claims (particularly those involving the disappearance of persons) in the U.S. despite the significant passage of time since the events in question. The German courts, lacking such an equitable tolling doctrine, would dismiss claims of this vintage as untimely. . .

Id. ¶ 5.[6] In their supplemental briefing, the plaintiffs do not make additional arguments that Germany would be an inadequate forum. DCAG addresses the time-bar issue with a declaration from its German legal expert, Stephan Rüzel. *See* docket no. 99. Rüzel states:

> I understand that, when U.S. courts refer to "equitable tolling," they are referring to a set of rules that stop a statute of limitations from running in certain circumstances where it would be unjust or inequitable to bar a plaintiff's claim. Germany recognizes princi-

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[6] This paragraph of Kaleck's declaration generally describes DCAG's arguments before German courts regarding DCAG's attempts to prevent itself from being served with process under the Hague Convention. It is not completely clear whether Kaleck believes the section quoted above or is merely reporting DCAG's argument.

ples that are similar to the U.S. doctrine referred to as equitable tolling. For example, under paragraph 1, section 199 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), the limitations period applicable to plaintiffs' claims would not begin running until the end of the year, after plaintiffs became aware (or would have become aware but for gross negligence) of both: (a) the circumstances giving rise to their claims; and (b) the identity of alleged wrongdoer.

Additionally, under section 206 BGB, the limitations period can be tolled because plaintiff has been prevented by *force majure* from pursuing his or her rights. German courts have recognized that one form of *force majure* can arise from a breakdown in the justice system such that a fair trial becomes impossible (*cf. Bundesgerichtshof*, Federal Court Reporter 126, 87, 97 ff.).

Lack of knowledge of the claim delays accrual of a claim up to 30 years. *See* BGB Section 199, Paragraph 2 (imposing 30-year limit on the amount of time for tolling related to plaintiffs' lack of knowledge of the claim, or gross negligence in failing to obtain such knowledge). Even where the 30-year bar would normally apply, however, there may be circumstances in which *force majure* would extend the limitations period.

I have reviewed the declaration that Wolfgang Kaleck submitted in support of plaintiffs' original briefing on May 16, 2005 (which was also cited in the Court's TR). Mr. Kaleck's claim that German courts do

> not recognize "equitable tolling" exploits a difference in nomenclature. Although German lawyers do not refer to the concepts set forth in authorities such as sections 206 and 199 BGB as "equitable tolling," it is clear that German law is similar in effect to U.S. law. Notably, Mr. Kaleck does not address section 206 or 199 BGB, or otherwise cite any authority supporting his position.

Id. ¶¶ 8-11 (paragraph numbering omitted). From Rüzel's latest declaration, it appears that plaintiffs' claims, which are based on events that occurred in 1976 and 1977, *see* 1st Am. Compl. ¶¶ 3-20, would not necessarily be time-barred.

b. Issues not Previously Reached

Neither party addresses in its supplemental briefing three issues not discussed in the November 22, 2005 order: whether German law would allow a human rights action against a corporation, whether Argentine citizens would have access to German courts for a suit like this one, and whether German courts can order document production.

Comparing the declarations of Kaleck and Rützel from the original briefing, though, the court notes Rüztel's declaration provides references to several relevant sources of German law: the Basic Law of 1949 (described as "the German constitution"), various federal statutory sections, case law, and applicable international treaties. *See* docket no. 62 ¶¶ 7-24. According to Rützel, "causes of action" "for the harm Plaintiffs claimed to have suffered during the 'Dirty War' . . . are available under German law," *id.* ¶ 17, "the German legal system is designed to vigorously safeguard basic individual and human rights . . . regardless of the nationality of the individual," *id.*

¶ 10, and German corporations are "liable for any damage which the board, a member of the board or other duly appointed representative may, in carrying out his duty, cause a third party," *id.* ¶ 20. He concludes that "if the Plaintiffs can prove that the tortious conduct resulted in the harm they alleged, the Plaintiffs could be entitled under German law to extensive damages to compensate for any harm and for losses suffered including damages for pain and suffering." *Id.* ¶ 25.

In his declaration, on the other hand, Kaleck states:

> In Germany, there is no special legislation covering human rights violations occurring prior to July 30, 2002. The cause of action the Argentine Plaintiffs have in the U.S. under the Alien Tort Claims Act and Torture Victims Protection Act, to obtain compensation for the alleged violations of human rights committed by the predecessor of DaimlerChrysler AG well prior to 2002, simply has no analogue in the German legal system. That is, the Argentines simply have no chance to bring a civil action for damages in German courts against DaimlerChrysler AG. Such an action would simply be impossible in Germany. Rather, the only possible action the plaintiffs might have is a criminal action in Germany against individual officials, but only German nationals, of DaimlerChrysler AG, as opposed to the company itself which would not be subject to criminal proceedings.

Kaleck Decl. ¶ 4. Kaleck cites no law in support of his claims. (He also does not explain the significance, if any, of July 30, 2002.) Kaleck also reports

that DCAG vigorously argued in German courts that it could not be served with process in Germany, and that in those proceedings DCAG argued German law did not hold corporations liable for aiding "state actors in the commission of human rights abuses" and that causes of action analogous to those here do not exist under German law. *Id.* ¶ 5. It is not clear to the court, though, whether Kaleck himself believes these assertions to be an accurate statement of German law. Furthermore, that Germany lacks causes of action analogous to the ATCA and TVPA does not necessarily mean German courts cannot provide any remedy for the harms allegedly suffered by the plaintiffs. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1175 n.5, 1178 (9th Cir. 2006).

Given Rüzel's much more thorough treatment, the court will accept his statements that German law would allow a human rights action against a corporation, that Argentine citizens would have access to German courts for a suit like this one, and that German courts can order document production, and given plaintiffs' current failure to address the argument that Germany is not an available forum, the court determines that Germany is an adequate alternative forum for the plaintiffs' claims.

Given that both Argentina and Germany could provide plaintiffs with an adequate forum, this court's exercise of general jurisdiction over DCAG in this action would be unreasonable. This court therefore concludes that it lacks general jurisdiction over DCAG for the purposes of this action.

C. Plaintiffs' New Arguments for Jurisdiction under Rule 4(k)(2) or Transfer under 28 U.S.C. § 1406

Plaintiffs' arguments that this court has jurisdiction based on Rule 4(k)(2) or that this action should be transferred to the Eastern District of Michigan under 28 U.S.C. § 1406 are beyond the scope of the briefing the court requested. On this basis alone, the rejects these newly-raised arguments.

However, even considering plaintiffs' Rule 4(k)(2) argument on the merits, it fails. Under Rule 4(k)(2),

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

The Ninth Circuit has identified three requirements for application of this rule: "(1) the cause of action must arise under federal law; (2) the defendant must not be subject to the personal jurisdiction of any state court of general jurisdiction; and (3) the federal court's exercise of personal jurisdiction must comport with due process." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1126 (9th Cir. 2002). As above, the unreasonableness of assertion of jurisdiction and the existence of the alternate fora of Germany and Argentina means that personal jurisdiction over DCAG would not comport with due process.

Under § 1406(a), "The district court of a district in which is filed a case laying venue in the wrong di-

vision or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Transfer under § 1406 would not "be in the interest of justice" because personal jurisdiction is lacking over DCAG.

The court does not discount the gravity of plaintiffs' allegations, but jurisdictional limitations dictate that this court is not the proper forum for their claims.

III. ORDER

For the foregoing reasons, the court:

1. finds it lacks personal jurisdiction over DCAG; and

2. denies plaintiffs' request for transfer under 28 U.S.C. § 1406.

Judgment will be entered accordingly.

DATED: 2/12/07

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

APPENDIX D

E-FILED on 11/22/05

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BARBARA BAUMAN, et al., Plaintiffs, v. DAIMLERCHRYSLER AG, and DOES 1 through 50, inclusive, Defendants.	No. C-04-00194 RMW ORDER TENTATIVELY GRANTING DEFENDANT'S MOTION TO DISMISS **[Re Docket No. 36]**

Specially-appearing defendant DaimlerChrysler AG ("DCAG") filed a motion to quash service and dismiss for lack of personal jurisdiction. Plaintiffs oppose the motion. The motion to dismiss was heard on June 17, 2005. The motion to quash was withdrawn. The court has reviewed the parties' papers filed before the hearing and considered their arguments. The court has also reviewed plaintiffs' post-hearing notice of filing of supplemental authority but sustains defendant's objection to its consideration.

For the reasons set forth below, the court tentatively grants DCAG's motion to dismiss for lack of personal jurisdiction but allows plaintiffs some limited jurisdictional discovery.

I. BACKGROUND

Plaintiffs are twenty-three people, one of whom is a citizen of Chile and the rest of whom are citizens of Argentina. Amend. Compl. ¶¶ 3-21. Plaintiffs allege that Mercedes-Benz Argentina ("MBA")—now known as DaimlerChrysler Argentina ("DCA")—collaborated with the Argentine government to kidnap, detain, torture, or kill plaintiffs or plaintiffs' relatives during Argentina's military regime of 1976 to 1983, known as the "Dirty War." *Id.* ¶¶ 1-21. Claiming that DCA is either a division or wholly-owned subsidiary of DCAG, plaintiffs bring this action against DCAG under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350. *Id.*

In 1998, Chrysler Corporation and Daimler-Benz AG became wholly-owned subsidiaries of DCAG. Louann Van Der Wiele Decl. Supp. DCAG's Mot. ("Wiele Decl.") ¶ 2. Consequently, Chrysler Corporation, which had its principal place of business in Auburn Hills, Michigan, changed its name to DaimlerChrysler Corporation ("DCC"). *Id.* DCC maintains the same headquarters as Chrysler Corporation had maintained before. *Id.*; Miller Decl., Ex. 1.

DCAG contends that it is a German stock company with headquarters located in Stuttgart, Germany. *Id.*; Amend. Compl. ¶ 22. DCAG is not qualified or authorized to do business in California and does not import, manufacture, sell, service, or warranty cars in California. It manufactures Mercedes-Benz vehicles in Germany. Peter Waskonig Decl.

Supp. DCAG's Mot. ("Waskonig Decl.") ¶ 3. A separate Delaware corporation, Mercedes-Benz United States, LLC ("MBUSA") purchases Mercedes-Benz cars in Germany, imports them into the United States, and distributes them throughout the United States. *Id.* ¶¶ 7, 10. MBUSA also provides all product advertisement, service and sales support for Mercedes-Benz vehicles in the United States. *Id.* ¶ 7. Plaintiffs, however, allege that DCAG is both an American and German corporation with headquarters in both countries, respectively, in the cities of Auburn Hills and Stuttgart. Brian Campbell Decl. Opp. DCAG's Mot. ("Campbell Decl."), Ex. 1, 2.

Plaintiffs originally named DCC as the defendant. Compl. ¶ 1. They subsequently amended their complaint, replacing DCC with DCAG as the defendant. Amend. Compl. ¶ 1. Plaintiffs originally believed that DCAG had its sole headquarters in Stuttgart, Germany. Compl. ¶ 22. In accord with the procedures set forth by the Hague Convention for international service of process, plaintiffs initiated service attempts upon DCAG through the German courts. Plaintiffs' Ex Parte Appl. Ct. Iss. Amend. Summons ("Appl. Amend. Summons") ¶ 1. The German district court authorized service of process upon DCAG on July 14, 2004. Req. Jud. Not. ("RJN"), Ex. A. On September 7, 2004, however, the German appellate court halted service to determine whether service would violate Germany's sovereignty rights. If that was the case, the requested service could potentially be refused according to the Hague Convention, Article 13(1). *Id.* Whether plaintiffs' requested service in Germany will be permitted awaits resolution by Germany's highest court of a matter involving Napster and Bertelsmann AG, which poses similar issues. *Id.* On March 7, 2005,

after hearing the parties' comments on the temporary suspension of service, the German appellate court reaffirmed its original stay order. RJN, Ex. B.

From a proxy statement to shareholders regarding the 1998 merger of Chrysler Corporation with Daimler-Benz AG, plaintiffs discovered that DCAG purports to maintain operational headquarters at the DCC headquarters in Auburn Hills, Michigan. Appl. Amend. Summons at 3. Plaintiffs then applied for and were issued an amended summons for DCAG at the Auburn Hills location.

On January 28, 2005, plaintiffs' process server first attempted to serve DCAG at DCC headquarters but was unsuccessful. Sunny Miller Decl. Opp. DCAG's Mot. ("Miller Decl.") ¶ 3; Elizabeth Tichvon Decl. Supp. DCAG's Mot. ("Tichvon Decl.") ¶¶ 2-5. Elizabeth Tichvon, the service of process paralegal for DCC, explained to the server that she and DCC were not authorized to accept service of process on behalf of DCAG. *Id.*; Wiele Decl., Letter from Van Der Wiele to Plaintiffs' Counsel of 3/2/05, Ex. 1. On February 15, 2005, plaintiffs' process server Sunny Miller attempted to serve process on DCAG at the DCC headquarters but was not permitted to proceed any further than the reception area. Miller Decl. ¶ 5; Tichvon Decl. ¶ 6. Tichvon explained to Miller that DCC and not DCAG was located at the premises. Miller Decl. ¶ 3. In addition, Tichvon reiterated her statements on January 28 to Miller and told Miller that she did not work for DCAG. Tichvon Decl. ¶ 6. Plaintiffs contend that as Tichvon walked away, Miller told her that he was leaving the papers there for DCAG. Miller Decl. ¶ 5. Miller then left the papers at the security desk in the presence of security guard Eric Uzenski, who works for Wackenhut Corpora-

tion. *Id.* The papers were returned to plaintiffs' counsel. Wiele Decl. ¶ 6.

On March 3 and March 10, 2005, plaintiffs mailed copies of the summons and complaint to the DCC headquarters by registered mail. *Id.* ¶ 7. Plaintiffs also mailed a copy of the summons and complaint to the Michigan Corporation Securities Bureau. Miller Decl. ¶ 4. The documents were addressed to Jurgen Schrempp, Chief Executive Officer ("CEO") of DCAG. Wiele Decl. ¶ 6. DCAG contends that Schrempp was not present at the DCC headquarters on March 3 and 10. *Id.* at 7; Waskonig Decl. ¶ 11. In addition, DCAG contends that Schrempp has no office in Auburn Hills but has an office in Stuttgart, Germany. Plaintiffs, however, allege that Schrempp has offices in both Auburn Hills and Stuttgart. Waskonig Decl. ¶ 11; Campbell Decl., Ex. 2. Plaintiffs further allege that the copy of the summons and complaint sent on March 10, 2005, was signed for by an agent of DCAG. Miller Decl., Ex. 3.

DCAG filed a motion to dismiss for insufficiency of service of process, pursuant to Federal Rule of Civil Procedure 12(b)(5), and to dismiss for lack of personal jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(2). Mot. at 1. In response to plaintiffs' opposition, DCAG withdrew its challenge to service of process, but continues to assert that the court must dismiss the complaint for lack of personal jurisdiction. The parties agree that plaintiffs' claim does not arise out of or relate to DCAG's purported activity in California. Mot. at 9; Opp'n at 8. Thus, plaintiffs do not seek to establish specific jurisdiction over DCAG. *Id.*

Plaintiffs submitted a notice of filing of supplemental authority and exhibits on August 8, 2005 pursuant to Federal Rule of Civil Procedure 15(d). Defendant filed an objection to its consideration. The court sustains the defendant's objection to plaintiffs' supplemental materials, which were submitted without prior court approval and in violation to Civil L.R. 7-3(d) (except for a new judicial opinion, "once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval."). If the court considered plaintiffs' exhibits for the purpose of determining the existence of personal jurisdiction, the supplemental materials would only add marginally to the calculus in favor of jurisdiction.

II. ANALYSIS

The court may obtain personal jurisdiction over a defendant if it finds that either specific or general jurisdiction exists. Plaintiffs contend that the court has general jurisdiction over DCAG. General jurisdiction subjects a foreign defendant to suit within the forum state even on matters unrelated to its contacts with the forum. *Doe v. Unocal Corp.*, 248 F.3d 915, 923 (9th Cir. 2001). General jurisdiction requires a two-part inquiry: (1) whether defendant has "systematic and continuous contacts" with California; and (2) whether the assertion of general jurisdiction is reasonable. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 851 (9th Cir. 1993). Consequently, even if "continuous and systematic, contacts exist, the assertion of general jurisdiction must be reasonable." *Gator.com Corp. v. L.L. Bean*, 341 F.3d 1072, 1079-80 (9th Cir. 2003) (citing *Amoco*, 1 F.3d at 852–53).

This case presents a difficult question: can a federal court exercise personal jurisdiction over a case arising under federal subject matter jurisdiction in which plaintiffs are all foreign nationals and the defendant is a foreign corporation which has subsidiaries doing business in the United States?

Plaintiff has the burden of establishing that defendant has systematic and continuous contacts with the forum state. *See Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002); *Unocal*, 248 F.3d at 923. The standard for establishing general jurisdiction is "fairly high," requiring defendant's contacts in the state to be of a sort that "approximate physical presence" within the forum state. *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). Conceptually, plaintiff must establish that the defendant has been conducting business in California, not merely with California. *See Bancroft*, 223 F.3d at 1086.

When a district court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, the plaintiff need only make a prima facie showing of the jurisdictional facts to withstand the motion. *Unocal*, 248 F.3d at 922. In order to make a prima facie showing, plaintiff must allege facts which, if true, would be sufficient to establish personal jurisdiction. *Id.* If not directly controverted, plaintiffs' version of the facts is taken as true for the purposes of the motion. *Id.* Conflicts between the facts stated in the parties' affidavits must be resolved in plaintiff's favor during a prima facie jurisdictional analysis. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002).

Defendant has the burden of establishing that exercise of jurisdiction over it is unreasonable. *Amo-*

co, 1 F.3d at 851. To determine whether exercise of jurisdiction is reasonable, the following seven factors are balanced: (1) the extent of defendant's purposeful interjection into the forum; (2) the burden on the defendant of litigating in the forum; (3) the extent of conflict with the sovereignty of defendant's state; (4) the forum state's interest in adjudicating the issue; (5) the most efficient judicial resolution of the dispute; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternate forum. *Id.*

A. Systematic and Continuous Contacts

Courts focus on two primary areas when applying the "systematic and continuous contacts" test. First, they seek to determine whether there is "some kind of deliberate 'presence' in the forum state, including physical facilities, bank accounts, agents, registration, or incorporation." *Gator.com*, 341 F.3d at 1077. Second, courts "look at whether the company has engaged in active solicitation toward and participation in the state's markets, i.e., the economic reality of the defendant's activities in the state." *Id.* Plaintiffs seek to establish that DCAG has the requisite systematic and continuous contacts with California by arguing that (1) DCAG itself has such contacts or (2) DCAG has sufficient contacts by virtue of MBUSA, which plaintiffs contend acts as DCAG's agent. Opp'n at 8.

1. DCAG's Objections to Evidence

As a preliminary matter, DCAG objects to much of the evidence plaintiffs have submitted in support of their contention that this court has personal jurisdiction over DCAG, particularly to documents attached to the declaration of Brian Campbell. First, DCAG objects that plaintiffs have not properly au-

thenticated certain materials submitted in support of their opposition and that the materials are thus inadmissible as lacking foundation. The materials to which DCAG objects on the basis of authentication are pages printed from the www.daimlerchrysler.com website and a proxy statement and marketing brochure purportedly distributed by DCAG.

Although some courts have refused to consider unauthenticated internet documents for purposes of any motion, *see, e.g., Wady v. Provident Life and Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060 (C.D. Cal. 2002) (excluding internet evidence on a summary judgment motion for these reasons), this court agrees with a recent Central District of California decision holding that the court should consider the stage of litigation when determining the admissibility of unauthenticated evidence. In *Moose Creek, Inc. v. Abercrombie & Fitch Co.*, 331 F. Supp. 2d 1214 (C.D. Cal. 2004), the court considered unauthenticated internet documents submitted by plaintiffs in support of their motion for preliminary injunction for trademark infringement. The court stated:

> Rule 901(a) defines a standard of admissibility that is rather general or elastic: the evidence must merely be 'sufficient to support a finding that the matter in question is what proponent claims.' Although Plaintiffs are correct that these internet documents are not individually authenticated, the Court finds that at this stage they satisfy Rule 901(a).

Id. at 1225 n.4. Likewise, the court will consider plaintiffs' unauthenticated documents for purposes of determining whether DCAG is subject to personal jurisdiction.

Defendant also objects that the statements contained in the internet materials are offered for the truth of their contents and are thus hearsay. District courts have discretion to consider otherwise inadmissible evidence in ruling on an application for a temporary restraining order or preliminary injunction. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) ("It was within the discretion of the district court to accept this hearsay for purposes of deciding whether to issue the preliminary injunction."). Other courts have held that hearsay may be considered for purposes of determining personal jurisdiction, provided it bears circumstantial indicia of reliability. *Akro Corp. v. Luker*, 45 F.3d 1541, 1546-47 (Fed. Cir. 1995) ("[E]ven if Luker had objected to the hearsay nature of the statements at trial, such an objection would have been overruled, as we have held that hearsay 'bear[ing] circumstantial indicia of reliability' may be admitted for purposes of determining whether personal jurisdiction obtains.") (citing *Beverly Hills Fan v. Royal Sovereign Corp.*, 21 F.3d 1558, 1562 (Fed. Cir. 1994)). The court finds that the documents printed from the www.daimlerchrysler.com website bear such circumstantial indicia of reliability, as the printouts bear the date and site from which they were printed, along with the DaimlerChrysler banner style.[1] The court will consider plaintiffs' evidence printed from the DaimlerChrysler and MBUSA websites for the purpose of determining the existence of personal jurisdiction. The documents printed from other websites, however, do not bear these circumstantial indicia of reliability. The court sustains defendant's ob-

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[1] These documents could, in the alternative, be considered party admissions.

jection to the contents of Exhibits 5, 6, 7, 9, 10, 11, 12, 14, 20, and 21 to the Campbell declaration.

2. DCAG's Contacts

Plaintiffs present evidence of nine of DCAG's contacts in support of their claim that DCAG has continuous and systematic contacts with California. Opp'n at 9. DCAG, however, argues that plaintiffs have incorrectly attributed five of those nine contacts to DCAG when, in fact, they are contacts by certain subsidiaries of DCAG. Reply at 3. With regard to the remaining four contacts, DCAG argues that one contact is not supported by plaintiffs' evidence and that the other three contacts are insufficient to establish that DCAG has continuous and systematic contacts with California. *Id.* at 4-5.

a. Contacts Allegedly Attributable to Subsidiaries

The parent-subsidiary relationship itself is not sufficient to attribute the contacts of the subsidiary to the parent for jurisdictional purposes.[2] *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements, Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003) (citing Unocal, 248 F.3d at 925). Thus, only contacts that can properly be attributed to DCAG, and not its subsidiaries, may be used to determine whether DCAG has systematic and continuous contacts with California.

DCAG contends that plaintiffs wrongly attribute five contacts to it. First, plaintiffs point to a brochure published by DCAG in 2004, entitled *DaimlerChrysler Commitment to North America*. Opp'n at

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[2] An exception to this general rule occurs when the subsidiary is the alter ego or agent of the parent. Plaintiffs address this exception in the section of the analysis regarding MBUSA's systematic and continuous contacts.

9. In the section of this brochure entitled "Direct Economic Impact in North America – 2003," DCAG reported that it pays more than $64 million annually to 707 California employees, $15 million annually to 1,562 California retirees, $1 billion total to California suppliers, and $31 million annually to California in taxes. Campbell Decl., Ex. 4 at 42. Defendant, however, argues that the information in *DaimlerChrysler Commitment to North America* refers to the North American contacts of DCAG-affiliated subsidiaries and not those of DCAG. Reply at 3-4. Defendant claims that the entire brochure, including the "Direct Economic Impact in North America – 2003 section," makes clear that it is discussing a group of DaimlerChrysler affiliated subsidiaries located in North America. *Id.* at 3. In further support of its argument that the brochure does not refer to DCAG's own direct impact in North America, DCAG submits that it has no offices, agents, representatives, employees, property, or bank accounts in California. Waskonig Decl. ¶¶ 3-4. Aside from the brochure, plaintiffs have submitted no evidence to oppose DCAG's assertion.

Consolidating the activities of a subsidiary into the parent's reports is a common business practice. *Unocal*, 248 F.3d at 929 (quoting *Calvert v. Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1995)). Such consolidated statements are allowed by both the Internal Revenue Service and the Securities and Exchange Commission and recommended by generally accepted accounting principles. *Calvert*, 875 F. Supp. 679. Thus, although *DaimlerChrysler Commitment to North America* begins with a letter signed by the Chairman of DCAG, which tells the reader that "this brochure highlights many of our North American activities," the numbers published in *DaimlerChrysler*

Commitment to North America do not serve to establish that DCAG itself has California contacts.[3]

Second, plaintiffs point to an expenditure reported in DCAG's 2005 SEC 20-F filing of approximately $595,000 for advertising and related marketing activities with Black Enterprise Magazine in 2004. Campbell Decl., Ex. 15. Because Black Enterprise Magazine has offices in California, plaintiffs contend that this reported expenditure evidences a DCAG contact with California. In response, DCAG presents a declaration from its media purchasing affiliate stating that the amount cited by plaintiff was spent, not on behalf of DCAG, but on behalf of three of its subsidiaries: DaimlerChrysler Motors Company LLC, MBUSA, and Mitsubishi Motors North America, Inc. Peter L. Swiecicki Decl. Supp. DCAG's Reply ("Swiecicki Reply Decl.") ¶ 3. Thus, the evidence does not support the conclusion that the reported advertising expenditure may be properly attributed to DCAG.

DCAG's third alleged contact with California is its participation in the Stop Red Light Running Campaign, in which it purportedly made grants worth $200,000 to seven communities in the United States, including the City of Fresno, California. Campbell Decl., Ex. 17. Plaintiffs found the information in a press release from "Auburn

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[3] These numbers and documents may prove relevant to establishing DCAG's California contacts where plaintiffs seek to demonstrate that a subsidiary is an agent or alter ego of DCAG. *See, e.g., In Akzona Inc. v. E.I. Du PontNemours and Co.*, 607 F.Supp. 227, 238 (D.Del.1984), *cited in Unocal*, 248 F.3d at 928 (finding parent corporation's annual report clearly indicated parent corporation's corporate status as separate from relevant subsidiary).

Hills/Stuttgart" on the DaimlerChrysler website. *Id.* DCAG contends that it was DCC, not DCAG, that participated in the Stop Red Light Running Campaign. Louann Van Der Wiele Decl. Supp. DCAG's Reply ("Wiele Reply Decl.") ¶ 5.

Fourth, plaintiffs contend that DCAG filed for certification from the California Air Resources Board for its engines. The certification allegedly allows DCAG's products to be marketed in California. Campbell Decl., Ex. 8. DCAG, however, contends that it does not make submissions to the California Air Resources Board but that a distinct subsidiary company in the United States does so.[4] Peter Waskonig Decl. Supp. DCAG's Reply ("Waskonig Reply Decl.") ¶ 10. The filing itself does not constitute a contact of DCAG with the forum state. However, the impact of the filing, that DCAG's products may be marketed in California, may be relevant, as set forth below.

Fifth, plaintiffs allege that DCAG directly participated in the establishment of the California Fuel Cell Partnership, which involved Ferdinand Panik, Senior Vice President at DCAG, being present in California as chairperson of the organization. DCAG does not refute plaintiffs' allegation but contends first that the evidence is inadmissible and that DaimlerChrysler Research and Technology North America, Inc., is the only company in the DaimlerChrysler Group of companies that currently is a member of the California Fuel Cell Partnership. Waskonig Reply Decl. ¶ 9.

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[4] DCAG does not identify which subsidiary company performs this function.

The court concludes that DCAG has presented sufficient evidence that these contacts are attributable, not to DCAG, but to subsidiaries of DCAG. Accordingly, they are not properly considered direct contacts of DCAG to California.

b. California-specific product designs

As a sixth contact with California, plaintiffs claim that DCAG designs vehicles specifically for California, which indicates purposeful availment. Opp'n at 10. In support of this argument, plaintiffs offer evidence that DCAG produces cars to meet California's air quality standards. Campbell Decl., Ex. 11-12. Plaintiffs also offer evidence that DCAG built a prototype fuel cell vehicle specifically for United Parcel Service ("UPS") to use in California and that DCAG built a fuel cell for the California Fuel Cell Partnership, which DCAG tested by driving 25,000 miles on California roads. Campbell Decl., Ex. 13. DCAG does not deny that it produces cars to meet California's air quality standards or that it built a fuel cell for the California Fuel Cell Partnership. However, DCAG uses plaintiffs' evidence to demonstrate that Mercedes-Benz vehicles sold in California have the same design, including emission-system design, as those sold elsewhere in the United States. Reply at 4. DCAG also does not deny its activities with UPS but contends that its Mercedes-Benz hydrogen fuel cell vehicles in California do not differ in design from those elsewhere in the world and that its Mercedes-Benz hydrogen fuel cell vehicles are not sold to the public in California. *Id.* at 4-5.

Designing a product specifically for the forum market has traditionally been helpful for establishing purposeful availment for specific jurisdiction. "Whether dealing with specific or general jurisdic-

tion, the touchstone remains 'purposeful availment' . . . [to] ensure[ ] that 'a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts.'" *Gator.com*, 341 F.3d at 1076 (citing *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002)). However, purposeful availment alone is not enough to establish general jurisdiction; the purposeful availment itself must be systematic and continuous. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 112-13 (1986); *Rockwell Int'l v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F. Supp. 328, 331-32 (E.D. Pa. 1982); *see also Calvert*, 875 F. Supp. at 677 (concluding that evidence used to establish specific jurisdiction does not establish general jurisdiction unless it is continuous and systematic). Although plaintiffs' unrefuted evidence establishes that DCAG designed products that could be marketed in California, among other locations, and built prototypes for testing and use on California roads by UPS and others, this purposeful availment is not sufficiently systematic and continuous for the exercise of general jurisdiction.

c. Remaining Contacts

Of the nine contacts that DCAG allegedly has with California, the three remaining are not disputed by the parties, but DCAG contends that they do not support the assertion of general jurisdiction.

First, DCAG is listed on the Pacific Stock Exchange located in San Francisco, which plaintiffs allege gives DCAG countless benefits including access to innovative electronic trading technology, increased liquidity of its assets, and higher corporate visibility. Second, plaintiffs contend that DCAG has pursued enough litigation in California to retain permanent

counsel in San Francisco. This litigation includes DCAG initiating actions in the federal courts of California challenging California's clean air laws and initiating additional actions in California to protect its patent rights. Opp'n at 10. Furthermore, DCAG answered a complaint in a case unrelated to this one but within this district and cross-complained after waiving service of process. Opp'n at 10. Third, as a corporate partner in the Global Nature Fund, DCAG has been participating in the Living Lakes Project at Mono Lake in California. Campbell Decl., Ex. 16. Part of this project involved DCAG employees or their family members traveling to Mono Lake to participate in a nature camp in 2003. *Id.*

The single trip by DCAG employees or their family members to Mono Lake, California, as part of DCAG's participation in the Living Lakes Project, cannot be regarded as a contact of continuous and systematic nature. *See Helicopteros*, 466 U.S. at 416 (reasoning that "the one trip to Houston by Helicol's chief executive officer for the purpose of negotiating the transportation-service contract with Consorcio/WSH cannot be described or regarded as a contact of 'continuous and systematic' nature"). Neither is a listing on a stock exchange, without more, sufficient to confer general jurisdiction. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 97 (2d Cir. 2000).

The lawsuits that DCAG filed in California courts to challenge California's clean air laws and protect its patents are likely central to DCAG's business functions but do not serve to establish contacts of a continuous and systematic nature sufficient to confer personal jurisdiction. For example, in *Calvert*, the district court determined that the defendant demonstrated a kind of purposeful availment similar

to that necessary for the exercise of limited or specific jurisdiction by initiating a lawsuit in a California court. *Calvert*, 875 F. Supp. at 677. However, the court determined that a single defendant-initiated lawsuit does not establish general jurisdiction because it was neither continuous nor systematic. *Id.* Similarly, in *Soma Medical Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999), defendant bank had filed a small number of financing statements, recorded several instruments, and filed five civil cases in the forum state to recover monies and/or foreclose on trust deeds. The court in *Soma* held that those were not the kinds of activities which courts have found necessary to subject a defendant to general jurisdiction. *Soma Medical Int'l*, 196 F.3d at 1296. While DCAG's lawsuits may be systematic in the sense that they are part of a larger corporate business or litigation plan, there is no evidence of either a larger corporate plan or such continuous and substantial litigation as to justify finding general jurisdiction over DCAG. Furthermore, retaining permanent counsel in California is "the type of ongoing contact needed for general jurisdiction," but this contact alone is not sufficient to establish general jurisdiction over DCAG. *Calvert*, 875 F. Supp. at 677.

d. Conclusion

The court finds that plaintiffs' allegations do not establish that DCAG has continuous and systematic contacts with California. Plaintiffs have failed to establish that DCAG has contacts approximating a physical presence in California. *See, e.g., Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (finding general jurisdiction when president of Philippines-based corporation maintained office, kept company files, held director meetings, distributed salaries, and conducted other company business in

the forum state). The contacts that plaintiffs allege in support of their contention that DCAG has continuous and systematic contacts with California are not of the pervasive nature required to find general jurisdiction over DCAG. In *Helicopteros*, for example, the defendant had purchased more than $4 million in equipment from a company in the forum state and sent management and maintenance personnel to receive training at that company in the forum state. *Helicopteros*, 466 U.S. at 411-12. During this seven-year period, the defendant had also negotiated a contract in the forum state and received $5 million in payments from a bank located within the forum state. *Id.* However, the Supreme Court held that these contacts were insufficient for establishing general jurisdiction over the defendant. *Id.* at 418-19.

Plaintiffs have not demonstrated that DCAG has directly invested more in California than the defendant in *Helicopteros*. Plaintiffs also have not demonstrated that DCAG's Pacific Stock Exchange listing, California litigation, participation in the Living Lakes Project, building a fuel cell for UPS, and helping to establish the California Fuel Cell Partnership amount to contacts with the forum state that are greater than those of the defendant in *Helicopteros*. In *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573-74 (2d Cir. 1995) the court found that while the defendant's contacts standing alone were not continuous and systematic, together they were sufficient to establish general jurisdiction. However, this is not the case here: even when DCAG's California contacts are considered as a whole, as the court did in *Metropolitan Life Ins. Co.*, they fall short of establishing the systematic and continuous contacts necessary for this court to have general jurisdiction over DCAG.

3. Agency Relationship with MBUSA

Plaintiffs alternatively contend that DCAG has continuous and systematic contacts with California through MBUSA's contacts. Opp'n at 17. MBUSA has its principal place of business in New Jersey and is wholly-owned by DaimlerChrysler North America Holding Company ("DCNAHC"), a Delaware corporation. DCNAHC is a subsidiary of DCAG. Waskonig Decl. ¶ 8. MBUSA serves the United States market as DCAG's exclusive Mercedes-Benz importer and sales agent for the United States. Waskonig Decl. ¶ 7. Plaintiffs point out that MBUSA is the single largest supplier of luxury vehicles to the California car market, and that over 10 percent of all new vehicle sales in the United States take place in California.[5] Furthermore, MBUSA has a regional office in Costa Mesa, California, a Vehicle Preparation Center in Carson, California, and a Classic Center in Irving, California. Campbell Decl., Ex. 19. DCAG does not dispute that MBUSA is subject to general jurisdiction in California but argues that MBUSA's contacts cannot be imputed to DCAG.

A subsidiary's contacts may be imputed to the parent where the subsidiary is the parent's alter ego or where the subsidiary acts as the general agent of the parent. *Rutsky*, 328 F.3d at 1134. How the courts determine whether a subsidiary is an alter ego or agent of the parent has undergone a gradual evolution. *See, e.g., Unocal*, 248 F.3d at 925 (delineating

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[5] This point is, however, unsupported by admissible evidence because the web pages provided by plaintiffs supply only unauthenticated hearsay. However, as DCAG does not directly refute this evidence, the court will consider it for purposes of determining whether DCAG has sufficient minimum contacts through MBUSA.

two separate tests for alter ego and agency); *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1405-06 (9th Cir. 1994); *Kramer Motors, Inc. v. Br. Leyland, Ltd.*, 628 F.2d 1175, 1177-78 (9th Cir. 1980) (finding that day-to-day control over the subsidiary by the parent was required to find a subsidiary to be an alter ego or agent of the parent); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 422-24 (9th Cir. 1977) ("The common law requirements of a 'general agency' demand that such substantial activities be carried on for the benefit of the principal that, in some cases, those same activities may indeed be sufficient to render the principal himself 'present' under the 'continuous and systematic' test of *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-46, 72 S.Ct. 413, 96 L.Ed. 485 (1952).").

a. Alter Ego

To establish that the subsidiary is the alter ego of the parent corporation, the plaintiffs "must make out a prima facie case '(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.'" *Rutsky*, 328 F.3d at 1134 (quoting *Unocal*, 248 F.3d at 926). Plaintiffs do not seek to demonstrate that MBUSA is an alter ego of DCAG.

b. Agency

The Ninth Circuit in *Rutsky* described the agency test:

> To satisfy the agency test, plaintiffs must make a prima facie showing that the subsidiary represents the parent corporation by performing services "sufficiently important to the [parent] corporation that if it did not

> have a representative to perform them, the [parent] corporation . . . would undertake to perform similar services." The agency test permits the imputation of contacts where the subsidiary was either "established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself."

Rutsky, 328 F.3d at 1135 (citations omitted) (quoting *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir. 1994)). In determining whether a subsidiary satisfies the agency test, the following factors may be relevant: (1) what percentage of the parent corporation's business comes from the subsidiary; (2) whether the parent corporation's only agent in the United States is the subsidiary; and (3) whether the parent corporation conducts marketing activities in the United States. *Chan*, 39 F.3d at 1406. Furthermore, while a parent corporation's day-to-day control over the subsidiary's activities may contribute to an agency finding, it is not the sine qua non of the agency test. *Modesto City Sch. v. Riso Kagaku Corp.*, 157 F. Supp. 2d 1128, 1134 (E.D. Cal. 2001) (analyzing *Unocal*); *see also Synopsys v. Ricoh Co.*, 343 F. Supp. 2d 883, 887 (N.D. Cal. 2003). As noted by the Ninth Circuit in *Unocal*, "'[t]he question to ask is not whether the American subsidiaries can formally accept orders for their parent, but rather whether, in the truest sense, the subsidiaries' presence substitutes for the presence of the parent.'" *Unocal*, 248 F.3d at 928-29 (quoting *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F.Supp. 1322, 1342 (E.D.N.Y.1981)).

Plaintiffs' evidence regarding the factors suggested in *Chan* is inconclusive. Based upon DCAG's declaration that MBUSA is the exclusive distributor

of Mercedes-Benz vehicles in the United States, the court can infer that MBUSA must provide a significant amount of business to DCAG through the American automobile market. It is clear that MBUSA is not DCAG's only subsidiary in the United States (or even in California), however, it is certainly a subsidiary that engages in substantial activity by selling Mercedes-Benz products in the United States. Furthermore, DCAG argues that it does no advertising in the United States—all such advertising is performed by its subsidiaries. With regard to day-to-day control, plaintiffs have provided no evidence whatsoever that DCAG exercises operational control over MBUSA.

Thus, the court again turns to the question of whether MBUSA's presence in California "substitutes for the presence of" DCAG. To make this determination, a court should look to the main business of the parent and subsidiary. *See, e.g., Unocal*, 248 F.3d at 929. If the business of the parent is carried out entirely at the parent level, the subsidiary's activities are not imputable to the parent. *Id.* DCAG argues its business is manufacturing Mercedes-Benz vehicles and parts. MBUSA is not involved in this manufacturing but purchases Mercedes-Benz vehicles in Germany (where title passes) and imports them into the United States. Waskonig Decl. ¶ 10. DCAG has no control over the ultimate destination of the products in the United States and none of the dealerships at which the vehicles are sold is a subsidiary of Mercedes-Benz. *Id.* DCAG also points out that even before MBUSA (and its predecessor entities) came into existence, independent non-subsidiary companies distributed Mercedes-Benz vehicles in the United States. *Id.* Plaintiffs, on the other hand, argue that without MBUSA or another

similar entity to import and sell its products into the United States, DCAG would not be able to sell vehicles in the United States market.

On somewhat analogous facts, a Northern District of California court found an agency relationship between Ricoh Company, a Japanese corporation with no sales in or other direct contacts with California, and Ricoh Corporation, a subsidiary of Ricoh Company that functioned as its main marketing and distribution arm for North and South America. *Synopsys, Inc. v. Ricoh Co., Ltd.*, 343 F. Supp. 2d 883 (N.D. Cal. 2003). The court found Ricoh Company subject to personal jurisdiction in California and concluded that "it is evident that Defendant's multifaceted operations are necessary to its viability in the forum and represent tasks Defendant would have to perform itself but for the existence of its subsidiaries based in this forum or registered to do business here." *Id.* at 887. In the present case, without MBUSA or another distributor, DCAG would not be able to sell Mercedes-Benz vehicles in California. However, it is not clear that it would be required to perform such functions itself to avail itself of the California, luxury-vehicle market. In contrast, Ricoh Company had three subsidiaries in California and another registered to do business here. It appears the tasks performed by these subsidiaries were ones the court felt Ricoh Company would have had to perform itself but for the existence of its subsidiaries. No evidence suggested these operations were ones that could be performed, for example, by a wholly independent company. Although admittedly a close question, the court concludes that the activities of MBUSA should not be imputed to defendant for the purpose of establishing personal jurisdiction over DCAG.

B. Reasonableness

Even assuming the existence of sufficient minimum contacts with the forum state to support the exercise of general jurisdiction, exercise of personal jurisdiction must nonetheless be reasonable. "For jurisdiction to be reasonable, it must comport with 'fair play and substantial justice.'" *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)). As set forth above, the court considers seven factors in determining whether the exercise of personal jurisdiction is reasonable. *Amoco*, 1 F.3d at 851. DCAG claims that all seven factors militate against the exercise of jurisdiction.

1. Purposeful Interjection into California

The first factor of the scope of defendant's purposeful interjection into the forum state favors exercising jurisdiction. "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). By initiating lawsuits in California courts to challenge the state's clean air laws and to protect DCAG's patents and other business interests, DCAG has purposefully availed itself of the privilege of conducting business within California. *See Calvert*, 675 F. Supp. at 677 (citing *Vorys, Sater, Seymour, & Pease v. Ryan*, 154 Cal. App. 3d 91, 94 (1984)). Additionally, the Supreme Court in *World-Wide Volkswagen* indicated that a corporation demonstrates purposeful availment when the sale of its product "is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indi-

rectly, the market for its product in other states." *World-Wide Volkswagen Corp.*, 444 U.S. at 297. Given that California consumers account for 10 percent of new vehicles purchased in the United States and that one of DCAG's subsidiaries is the single largest supplier of luxury vehicles to California, it is reasonable to infer that the sale of DCAG's vehicles, including Mercedes-Benz vehicles, in California is not an isolated occurrence but arises from the efforts of DCAG to serve the California market. Thus, on the basis of purposeful availment, exercise of personal jurisdiction over DCAG would not be unreasonable.

2. Burden on DCAG of Litigating in California

The second factor tips in DCAG's favor. None of the events in question occurred in California, and there is no contention that any discovery will be conducted in California nor that any potential witnesses are located here. *See Rocke v. Can. Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981) (concluding that the occurrence of the alleged acts in Canada created substantial burden for the defendant to litigate in California because of the location of potential evidence and witnesses). DCAG will be further burdened because this court will be unable to compel the attendance of any Argentine witness who is not a party in the case and not a current DCAG employee, for either trial or deposition testimony. *See Doe v. Sun Int'l Hotels, Ltd.*, 20 F. Supp. 2d 1328, 1330 (S.D. Fla. 1998) (noting, in *forum non conveniens* context, that witnesses who are defendant's employees are under defendant's control); *Duha v. Agrium, Inc.*, 340 F. Supp. 2d 787, 796 (E.D. Mich. 2004) (noting, in *forum non conveniens* context, that the court cannot compel attendance of unwilling witnesses). Lastly, as DCAG is a German corporation, it may in-

cur unique burdens in defending itself in the United States legal system. *Asahi*, 480 U.S. at 113.

DCAG's burden of having to defend itself under the United States' legal system, however, will likely be minimal as it is a sophisticated, global business, has previously litigated in California, retains permanent counsel in California, and has subsidiaries in California. *See Wiwa*, 226 F.3d at 99 (finding that defendant foreign corporations would not be subject to great inconvenience in litigating in the forum state, despite the fact that the disputed events did not occur in the forum state, because defendants controlled a wealthy and far-flung business empire, had a physical presence in the forum state, had access to enormous resources, faced little or no language barrier, had litigated in the country on previous occasions, had a four-decade long relationship with one of the nation's leading law firms, were the parent companies of one of America's largest corporations, and had to defend themselves in New York City, which was "a major world capital"). It is not clear that the burden on DCAG of litigating in California presents an "inconvenience [that] is so great as to constitute a deprivation of due process." *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 128-29 (9th Cir. 1995). Thus, the burden alone will not overcome otherwise clear justifications for the exercise of jurisdiction. *Id.*

3. Conflict with Sovereignty of Argentina or Germany

Potential conflicts with another state's sovereignty, the third factor, also militate against the exercise of jurisdiction over DCAG. This factor is given greater importance where the events giving rise to the suit occurred on the foreign state's territory and when a foreign state has explicitly voiced a sovereign

interest in the case. *See Harris Rutsky*, 328 F.3d at 1133 (finding sovereignty considerations cut against jurisdiction where alleged tortious conduct of British defendants occurred in London); *Pac. Atl. Trading Co., Inc. v. M/V Main Exp.*, 758 F.2d 1325, 1330 (9th Cir. 1985) (finding Malaysia's sovereign interest weighed against jurisdiction "since the contract was executed in Malaysia by Malaysian citizens on forms supplied by a Malaysian bank"). On the other hand, sovereignty considerations are given less importance where the defendant has manifested an intent to serve and benefit from the United States market, for example, where a foreign defendant maintains a continuing business relationship with its United States agent. *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1199, 1200 (9th Cir. 1988). Moreover, "the factor of conflict with the sovereignty of the defendant's state 'is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court.'" *Id.* at 1199 (citing *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984)).

In this case, DCAG argues that Germany has expressed concern that this suit may violate its sovereignty rights by delaying service under the Hague Convention. Mot. at 13. Additionally, the conduct giving rise to the suit occurred entirely outside of California. These facts increase the importance of "the conflict with sovereignty factor," while DCAG's manifested intent to serve and benefit from the United States market by maintaining continuing business relationships with its multiple United States subsidiaries decreases its importance. Thus, the court concludes that this factor cuts slightly against the exercise of jurisdiction over DCAG.

4. California's Interest in Adjudicating the Dispute

The fourth factor requires consideration of California's interest in adjudicating the issue. California has little direct interest in adjudicating this suit. None of the plaintiffs is a California citizen, DCAG is not a California corporation, and the DCAG subsidiary allegedly involved in the human rights violations at issue has absolutely no demonstrated connection with California. However, Congress has expressed that human rights violations are the business of federal courts. *See Wiwa*, 226 F.3d at 106 (reasoning, in *forum non conveniens* context, from TVPA legislative history that "Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts"); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 339 (S.D.N.Y. 2003). Thus, although the court concludes that California has at least an abstract interest in adjudicating plaintiffs' dispute, its interest is only in a general goal of world-wide preservation of human rights. On balance, this factor weighs against the exercise of personal jurisdiction.

5. Absence of an Alternative Forum

Although typically listed as the seventh factor in the Ninth Circuit reasonableness analysis, the court next evaluates the absence of an alternative forum because plaintiffs contend that this factor influences the remaining two factors, efficient judicial resolution of the dispute and convenience and effectiveness of relief for plaintiffs. The plaintiffs bear the burden

of showing the absence of an alternative forum. *Harris Rutsky*, 328 F.3d at 1133.[6]

Plaintiffs claim that United States courts are the only courts that are empowered to hear their claims against DCAG and that will allow them to obtain "necessary" evidence. Opp'n at 19. In support of this argument, plaintiffs contend that both Argentina and Germany are unsuitable fora and will provide no effective relief for plaintiffs' claims. *Id.* They further contend that there exists no other alternative forum in which plaintiffs can proceed against DCAG and obtain effective relief. *Id.* at 19-20. DCAG, however, asserts that Germany and Argentina provide alternative fora, especially since the Argentine claims process is still open for victims of "Dirty War" crimes, like the plaintiffs in this case. Mot. at 14-15.

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[6] In performing this evaluation, the court may consider "any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. Accordingly, the court may consider expert testimony in determining the law of a foreign jurisdiction. *See also Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991) (moving party may demonstrate adequacy of alternative forum's law through affidavits and declarations of experts); *accord Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987). DCAG objects to the admissibility of the testimony of plaintiffs' foreign law experts, arguing that plaintiffs' experts' opinions are not adequately supported by the law. DCAG submits competing expert declarations on Argentine and German law. Because the court may consider testimony regarding foreign law irrespective of admissibility, the court considers the foreign law declarations submitted by both sides, but notes plaintiffs' experts' lack of citation to statutory or other legal authority.

a. Argentina as an Alternative Forum

Plaintiffs allege that they cannot bring their claims against DCAG in the Argentine legal system because Argentine courts do not permit lawsuits against "juridical persons" like corporations and require a court entrance fee of three percent of the total claim, which plaintiffs cannot afford. Ricardo Sans Decl. Opp. DCAG's Mot. ("Sans Decl.") ¶¶ 5, 14. Specifically in regard to their claims of human rights violations by DCAG, plaintiffs allege that the Argentine claims process, to which defendant refers, provides relief only for illegal conduct by its government during the "Dirty War" but not for illegal conduct by private parties during that period. *Id.* ¶ 6. In addition, plaintiffs allege that Argentina has amnesty laws protecting entities like DCAG that are accused of committing human rights violations during the "Dirty War." *Id.* ¶ 9. Plaintiffs support their contentions with the declaration of Mr. Monner Sans, their expert on Argentine law. Sans' declaration cites no legal basis for his assertions. *Id.* ¶ 6 ("[T]here are no legal provisions in force under Argentine law to sue a corporation for its responsibility in the violation of human rights.").

DCAG, however, submits expert testimony on Argentine law by Jorge Daniel Ortiz that plaintiffs can bring their claims against DCAG in the Argentine legal system because Argentina courts permit corporations to be sued for "quasi-delicts" or "delicts," which may be either a criminal offense or a civil wrong.[7] Ortiz Decl. ¶¶ 6-7. DCAG also asserts that

[7] Pursuant to Article 1072 of the Argentine Civil Code, DCAG's Argentine law expert describes delicts as "every illicit act executed knowingly and with intent to damage another person or his rights." Pursuant to Articles 1107-1123 of the Civil

Argentine law may exempt plaintiffs from paying the court entrance fee through a procedure called "benefit to litigate without affording court fees." *Id.* ¶ 9. Specifically with regard to plaintiffs' human rights claims, DCAG provides citations to statutory authority supporting its contention that Argentina provides causes of action similar to those available in the United States for human rights violations by corporations. *Id.* ¶ 8. Furthermore, DCAG contends that the Argentine amnesty laws to which plaintiffs refer were annulled by the Argentine Congress in August of 2003. *Id.* ¶ 16. The court concludes that DCAG has cited sufficient authorities to refute plaintiffs' contention that they may not bring their claims in Argentina.

However, plaintiffs allege that even if they were able to bring their claims in Argentina, they would not be able to obtain evidence necessary to pursue their claims because Argentina cannot order discovery or witness testimony from DCAG, and individuals located in Germany are beyond the reach of Argentine courts. Sans Decl. ¶¶ 5, 15. DCAG, however, claims that plaintiffs would be able to collect and present the evidence necessary to pursue their claims, although this procedure is not termed "discovery" in the Argentine legal system. Ortiz Decl. ¶ 11. Discovery procedures that are not identical to those in the United States but that are nonetheless adequate do not render an alternative forum inadequate. *See Lockman Found. v. Evangelical Alliance*

[Footnote continued from previous page]

Code, the expert describes quasi-delicts as illicit acts committed with fault or negligence, including vicarious tort liability imposed upon employers. Jorge Ortiz Decl. Supp. DCAG's Reply ("Ortiz Decl.") ¶ 7.

Mission, 930 F.2d 764, 768 (9th Cir. 1991) (holding, for *forum non conveniens* motion, that Japanese forum was adequate although discovery procedures were not identical to those in the United States); *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1484 (9th Cir. 1987) (finding, for *forum non conveniens* motion, that Singapore was an adequate forum although depositions were allowed only in certain circumstances); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1352-53 (1st Cir. 1992) (reasoning, for *forum non conveniens* motion, that an alternative forum ordinarily is not considered inadequate merely because its courts afford different or less generous discovery procedures than are available under American rules).

Finally, plaintiffs allege that the Argentine judiciary is subject to rampant corruption, that judicial resolution is severely hindered in various ways, and that the plaintiffs, judges and witnesses involved in the case would likely be subject to violent intimidation. Sans Decl. ¶¶ 10-12. Opp'n at 21-22. They also contend that the Argentine subsidiary of DCAG is a major contributor to Argentina's economy and would thus be subject to favorable treatment by the Argentine courts. Sans Decl. ¶ 8. In response, DCAG submits expert testimony refuting Sans' statement that "the most recent Report on Human Rights of the U.S. State Department" is the 2003 version. Ortiz states that the most recent version is the 2004 Report on Human Rights of the U.S. State Department ("2004 Report"), which lacks "any reference to reports that security forces are attempting to intimidate the judiciary, witnesses, or human rights organizations." Ortiz Decl. ¶¶ 12-13. Ortiz further points out that the 2004 Report recognizes the Argentine government's continued pursuit of anti-corruption

measures and accountability for human rights violations that occurred during the "Dirty War," with a Supreme Court ruling that crimes against humanity were not subject to statutes of limitations. *Id.* ¶ 14.

United States courts "have been reluctant to find foreign courts 'corrupt' or 'biased'" for the purpose of deeming the foreign forum inadequate. *See, e.g., Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 499 (2d Cir. 2002) (quoting *Blanco v. Banco Indus. de Venez., S.A.*, 997 F.2d 974, 981-82 (2d Cir. 1993)). In *Blanco*, plaintiffs alleged that the Venezuelan justice system contained systemic corruption and was biased in favor of defendants. Furthermore, plaintiffs in Blanco submitted evidence of political unrest in Venezuela. The court, however, concluded that Venezuela was a suitable alternative forum because "no convincing showing ha[d] been made of those 'rare circumstances' that render the proposed alternative forum 'clearly unsatisfactory.'" *Blanco*, 997 F.2d at 982 (quoting *Piper Aircraft v. Reyno*, 454 U.S. 235, 254 n.22 (1981)).

Considering the number of cases that have concluded that the foreign forum is adequate may be helpful in determining the adequacy of alternative fora. *See Blanco*, 997 F.2d at 981-82; *Lockman Found.*, 930 F.2d at 769 n.3 (considering other courts' findings as to whether alternative forum is adequate). DCAG cites a number of courts that have found Argentina to be a suitable forum,[8] however,

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[8] *See, e.g., Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1284 (11th Cir. 2001) (concerning product liability actions against aircraft manufacturer); *Duha*, 340 F. Supp. 2d at 801 (concerning various contract and tort actions arising from employment termination).

none of these cases evaluated suitability of the forum in a human rights context. *See, e.g., Wiwa*, 226 F.3d at 88 (recognizing that dismissal of ATCA claims on *forum non conveniens* grounds frustrates Congress' intent to address human rights abuses).

The suggestion by DCAG's Argentine law expert that the 2004 Report indicates that judiciary and witnesses in Argentina are not subject to intimidation is not supported by the text of the report. Most notably, the 2004 Report states, "Threats and beatings allegedly aimed to intimidate witnesses were common and, in some cases, occurred in connection with killings believed committed by members of security forces or their criminal allies," and "[t]here were credible allegations of efforts by members of security forces and others to intimidate the judiciary and witnesses . . . [with] [a]llegations of corruption in provincial courts . . . more frequent than at the federal level, reflecting strong connections between some of the governors and judicial powers in their provinces." Ortiz Decl., Ex. A at 5.

These persisting conditions cause the court concern. The question is whether this concern is sufficient to find the Argentine forum inadequate. For the court to find an alternative forum inadequate, that forum must be characterized by a complete absence of due process or an inability of the forum to offer any satisfactory remedy. *See, e.g., Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff'd*, 767 F.2d 908 (2d Cir. 1985) (mem.); *see also Piper Aircraft*, 454 U.S. at 254. Here, the plaintiffs are asserting human rights violations by a corporation in cooperation with the Argentine military. Although there is a possibility that the Argentine security forces may want to keep certain witnesses from testifying to DCAG's alleged acts, plaintiffs

have not alleged a strong rationale for why witnesses in a case against the corporation might be subject to such treatment.

DCAG has convincingly argued that plaintiffs would be able to file similar claims to those asserted here, obtain the equivalent of adequate discovery, and receive appropriate damages. Even in light of the potential intimidation, plaintiffs have not made out a prima facie case that "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft*, 454 U.S. at 254. Thus, Argentina provides plaintiffs an alternative forum, although, as set forth in further detail below, it may not be the most favorable forum for obtaining relief.

b. Germany as an Alternative Forum

Plaintiffs also contend that they cannot bring their claims in German courts because German courts fail to recognize either human rights actions against corporations or equitable tolling, without which plaintiffs' claims would be barred by the statute of limitations. Opp'n at 22; Wolfgang Kaleck Decl. Opp. DCAG Mot. ("Kaleck Decl.") ¶ 5. Plaintiffs additionally contend that Argentine citizens will not have access to German courts for the purpose of filing suit against a German corporation for its illegal actions in Argentina. Kaleck Decl. ¶ 5. Even if plaintiffs were able to file suit in Germany, plaintiffs point out that German courts cannot order document production. *Id.*; Opp'n at 19-20, 22-23.[9] DCAG de-

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[9] Plaintiffs contend that DCAG made these arguments before the German courts in their effort to halt service of process under the Hague Convention. Aside from their expert's assertion, there is no other evidence on the record that this is so.

nies plaintiffs' assertion that German courts fail to recognize human rights actions against corporations, contending that German courts recognize causes of action for human rights violations similar to those recognized in the United States. Stefan Rutzel Decl. Supp. DCAG's Reply ("Rutzel Decl.") ¶¶ 6-26. DCAG's German law expert, Dr. Stefan Rutzel, further concludes that "none of [plaintiffs'] relevant causes of action causes an exclusive jurisdiction of a court which would bar the jurisdiction of the German court." *Id.* ¶ 6. Of significance, however, DCAG does not refute plaintiffs' contention that their actions would be barred by the statute of limitations in Germany.

Preclusion of a claim by the alternative forum's statute of limitations renders the alternative forum inadequate. *See Miracle v. N.Y.P. Holdings, Inc.*, 87 F. Supp. 2d 1060 (D. Haw. 2000); *Crimson Semiconductor, Inc. v. Electronum*, 629 F. Supp. 903, 909 (S.D.N.Y. 1986) (ruling, in *forum non conveniens* motion, that foreign forum was unsatisfactory where statute of limitations bar in foreign forum did not simply go to the merits of plaintiffs' claim or to the quantum of damages but to the very existence of the claim). In the present case, undisputed expert testimony suggests that the assertion of plaintiffs' claims in Germany would be barred by the lack of equitable tolling provisions for this type of claim under German law. Thus, Germany does not appear to be an alternative forum available to the plaintiffs.

6. Efficient Judicial Resolution of the Dispute

The court next evaluates the efficiency of alternative fora. Here, as set forth above, that alternative forum is Argentina. In evaluating this factor, courts

have looked primarily at where the witnesses and evidence are likely to be located. *Ziegler v. Indian River County*, 64 F.3d 470, 475-76 (9th Cir. 1995) (quoting *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1489 (9th Cir. 1983)). As noted earlier, it is undisputed that plaintiffs' alleged injuries did not occur in California, and plaintiffs do not contend that relevant evidence is located in California. Thus, a consideration of the location of the dispute and evidence does not initially favor California as the proper forum.

Plaintiffs also argue that this court provides the most efficient forum because proceedings here will be conducted in English. Opp'n at 20. According to plaintiffs, DCAG officially conducts business in English, thus making it efficient for the parties to adjudicate this dispute in United States courts versus Argentine courts. *Id.* Were the dispute to be adjudicated in Argentina, DCAG's evidence would have to be translated into Spanish. Even assuming that DCAG conducts business in English, however, this does not account for the fact that plaintiffs are all Spanish speakers and that many of the alleged events occurred in Argentina. Thus, if adjudicating in the United States, all Spanish language evidence would need to be translated into English. This argument does not support plaintiffs' contention that the United States provides the most efficient forum for resolution of this dispute.

However, the court notes that the 2004 Report states "while the judiciary is nominally independent and impartial, some judges and judicial personnel were inefficient and, at times, subject to, and apt to exercise political manipulation. [] The system was hampered by inordinate delays, procedural logjams, changes of judges, inadequate administrative sup-

port, and incompetence." Ortiz Decl., Ex. A at 4. Thus, DCAG's own evidence supports a conclusion that this court would provide the more efficient and trustworthy judicial system for resolution of the present dispute. On the other hand, the witnesses and evidence are not located here but are located in Argentina. This factor is difficult to balance.

7. Convenient and Effective Relief to Plaintiff

Consideration of convenient and effective relief to plaintiffs favors jurisdiction, although it is generally not given as much weight as the other factors. *See Panavision*, 141 F.3d at 1316; *Core-Vent*, 11 F.3d at 1490. As before, plaintiffs contend that only United States courts will hold DCAG accountable for its alleged participation in the "Dirty War." Thus, plaintiffs conclude that this forum will provide them with the most convenient and effective relief. Although this court does not agree with plaintiffs' contention that the United States is the only adequate forum for their claims and, in fact, has found that Argentina presents an alternative forum for plaintiffs' claims, the possibility of plaintiffs encountering intimidation in Argentina for bringing a human rights suit involving actions by the Argentine government during its "Dirty War" tips this factor in favor of plaintiffs.

8. Conclusion

Although the question is a close one, the court tentatively concludes that this court does not have personal jurisdiction over DCAG. However, before making a final decision, limited jurisdictional discovery will be allowed on whether an agency relationship exists between DCAG and MBUSA and the ability of plaintiffs to pursue their claims in Germany (e.g., is the claim barred by the statute of limita-

tions?) or Argentina (e.g. does Argentine law allow human rights claims against private parties acting in concert with the government?)

III. ORDER

For the foregoing reasons, the court tentatively grants DCAG's motion to dismiss for lack of personal jurisdiction. However, before making a final decision, limited jurisdictional discovery may be undertaken. The parties may each submit up to twenty-five interrogatories and a narrowly tailored set of requests for production on the jurisdictional issues. A further hearing on the motion is hereby set for March 24, 2006, at 9:00 a.m. Any further briefing by plaintiff must be submitted by March 3, 2006, and any further briefing by defendant by March 10, 2006.

DATED: 11/22/05

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District
Judge

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA BAUMAN; GREGORY GRIECO; JOSEFINA NUNEZ; GABRIELE NUNEZ; MIRIAM NUNEZ; SILVIA NUNEZ; EMILIO GUILLERMO PESCE; MIRTA HAYDEE ARENAS; GRACIELA GIGENA; GUILLERMO ALBERTO GIGENA; NURIA GIGENA; AMELIA SCHIAFFO; ELBA LEICHNER; ANUNCIACION SPALTRO DE BELMONTE; HECTOR RATTO; EDUARDO OLASIREGUI; RICARDO MARTIN HOFFMAN; EDUARDO ESTIVILLE; ALFREDO MANUEL MARTIN; JUAN JOSE MARTIN; JOSE BARREIRO; ALEJANDRO DAER;
Plaintiffs-Appellants,

v.

DAIMLERCHRYSLER CORPORATION; DAIMLERCHRYSLER AG,
Defendants-Appellees.

No. 07-15386

D.C. No. CV-04-00194-RMW Northern District of California, San Jose

ORDER

Filed November 9, 2011

Before: Mary M. Schroeder, Dorothy W. Nelson, and Stephen Reinhardt, Circuit Judges.

Order;
Dissent by Judge O'Scannlain

ORDER

The panel has voted unanimously to deny the petition for rehearing. Judge Schroeder and Judge Reinhardt have voted to deny the petition for rehearing en banc, and Judge Nelson so recommended.

A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are **DENIED**. No further petitions for panel or en banc rehearing will be entertained.

O'SCANNLAIN, Circuit Judge, joined by TALLMAN, BYBEE, CALLAHAN, BEA, M. SMITH, IKUTA, and N.R. SMITH, Circuit Judges, dissenting from the denial of rehearing en banc:

Our court today extends the reach of general personal jurisdiction far beyond its breaking point. Its holding, that federal courts have personal jurisdiction over a German corporation for its Argentinian subsidiary's alleged activities in Argentina based simply on having a separate U.S.-based subsidiary, is an affront to due process. The panel ignores the Supreme Court's warnings that the Due Process Clause permits "defendants to structure their prima-

ry conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted). We thus place ourselves at odds again with the dictates of the Supreme Court, which has never approved such a broad jurisdictional reach as in this case. Moreover, our decision today is inconsistent with the law of at least six of our sister circuits. I therefore dissent from our regrettable failure to rehear this case en banc.

I

The facts pertinent to this appeal are relatively straightforward. Twenty-two Argentinian residents brought suit in the Northern District of California against DaimlerChrysler A.G. ("Daimler"), a German corporation, alleging that one of its subsidiaries, Mercedes-Benz Argentina, engaged in human rights violations in Argentina during that country's "Dirty War" in the 1970s and 1980s. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 911-12 (9th Cir. 2011). Without need for an evidentiary hearing, the district court properly dismissed the suit for lack of personal jurisdiction over Daimler. *Id.* at 913.

On appeal, the panel initially affirmed the district court. *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088 (9th Cir. 2009), *vacated*, 603 F.3d 1141 (9th Cir. 2010). Then — after granting rehearing and without additional oral argument — the panel inexplicably changed its mind and reversed the district court, holding that Daimler was indeed subject to general jurisdiction in California based solely "through the contacts of its subsidiary Mercedes-Benz USA." *Bauman*, 644 F.3d at 912. In so hold-

ing, the panel drastically expands the reach of personal jurisdiction beyond all constitutional bounds.

No one disputes that Daimler itself lacks sufficient contacts with California to render it subject to general personal jurisdiction there. Nor does anyone dispute that Daimler's U.S.-based subsidiary, Mercedes-Benz USA, *does* have sufficient contacts with California to render it subject to general personal jurisdiction. *See Bauman*, 644 F.3d at 920 n.11. But Mercedes-Benz USA was not joined as a party to this lawsuit. The only question, then, is whether Mercedes-Benz USA's mere existence in California renders Daimler subject to general personal jurisdiction for matters arising in Argentina without violating the Due Process Clause. *See id.* at 920.

II

As the Supreme Court recently reaffirmed, for a foreign corporation to be subject to general jurisdiction, its contacts with the forum state must be "so continuous and systematic as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). Our court today undermines this stringent standard by inventing a new test for general personal jurisdiction that gives Daimler no "minimum assurance as to where . . . conduct will and will not render [it] liable to suit." *Burger King Corp.*, 471 U.S. at 472 (internal quotation marks omitted).[1]

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[1] The reasoning in *Goodyear* is directly applicable here. *Goodyear* asked the question: "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?" *Goodyear*, 131 S. Ct. at 2850. The Court answered that question with a resounding, and unanimous, "no."

A

Under our case law, there are two separate tests for determining whether a subsidiary's contacts can be imputed to a parent corporation for purposes of general jurisdiction. *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001). One test, the alter ego test, requires a showing "(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice." *Id.* (internal quotation marks omitted). The panel correctly concludes that this test is not at issue here because there is no reasonable argument that Daimler controls Mercedes-Benz USA "to such a degree as to render the latter the mere instrumentality of the former." *Id.* (internal quotation marks omitted); *see Bauman*, 644 F.3d at 920.

Yet the panel finds general jurisdiction over Daimler here by reformulating our other test, the agency test. *See id.* at 931. As interpreted by the Bauman panel, the agency test requires two showings: First, the subsidiary's services must be "sufficiently important to [the parent] that they would almost certainly be performed by other means if [the

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[Footnote continued from previous page]

Said otherwise, an affiliate of a United States corporation is not subject to suit in a state where the affiliate itself took no action. By contrast, *Bauman* holds that an affiliate (in this case a foreign parent of a United States subsidiary) is amenable to suit in state court on claims unrelated to any activity of that affiliate in the forum State. This is exactly what *Goodyear* says we must not do; and as the Supreme Court explains, such an exercise of the state's coercive power is incompatible with the Due Process Clause. *See id.* at 2850-51.

subsidiary] did not exist, whether by [the parent] performing those services itself or by [the parent] entering into an agreement with a new subsidiary or a non-subsidiary national distributor for the performance of those services." *Id.* at 922.[2] Second, it must be shown that the parent has "the right to substantially control" the subsidiary's activities. *Id.* at 924.[3] In redefining the agency test, the panel drasti-

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[2] The panel's newly reformed test is not even an accurate characterization of our precedents. As we clearly stated in *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), the relevant inquiry under the first part of the agency test is whether "the subsidiary was either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake *itself*," *id.* at 1405 n.9 (emphasis added); *see also Harris Rutsky & Co. Ins. Servs. v. Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003); *Doe*, 248 F.3d at 928-29. Surely, in the absence of its subsidiary, Daimler would not undertake Mercedes-Benz USA's activities itself. Rather, Daimler could easily do what it has done in the past and, for example, hire some other entity to handle U.S. operations. *See Bauman*, 644 F.3d at 914 (discussing Daimler's history of "independent distributors to distribute Mercedes-Benz vehicles in the United States").

[3] The panel also errs in interpreting the second part of the agency test, which requires a high degree of control of the subsidiary by the parent, essentially reaching the level of actual day-to-day control. *See Doe* at 926 ("An . . . agency relationship is typified by parental control of the subsidiary's internal affairs or daily operations."); *see also Harris Rutsky & Co. Ins. Servs.*, 328 F.3d at 1135; *Kramer Motors, Inc. v. British Leyland, Inc.*, 628 F.2d 1175, 1177 (9th Cir. 1980). As the panel originally held, Daimler did not exercise "pervasive and continual control" over Mercedes-Benz USA. *Bauman*, 579 F.3d at 1096. That determination was correct. Far from having its day-to-day actions dictated from Germany, Mercedes-Benz USA has considerable autonomy to act within the terms of a General Distributor Agreement. *Bauman*, 644 F.3d at 914. Mercedes-Benz USA negotiates its own seller's agreements, *id.* at 915, and even

cally expands our test for personal jurisdiction and ignores the bedrock concerns of fundamental fairness that underpin Supreme Court due process jurisprudence.

B

The panel's interpretation of the agency test is far too expansive and threatens to make innumerable foreign corporations unconstitutionally subject to general personal jurisdiction in our courts. Indeed, it is difficult to see what limits there are on the panel's formulation. Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do "by other means" if the independent contractor, subsidiary, or distributor did not exist. *Bauman*, 644 F.3d at 922.

Such a result surely cannot be squared with the Supreme Court's repeated admonitions that due process must permit "defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.*, 471 U.S. at 472 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)) (internal quotation mark omitted). While the panel seems to be treating personal jurisdiction lightly — perhaps even as a mere technicality — we must not forget that limits on personal jurisdiction have constitutional underpinnings. *See Brown*, 131 S. Ct. at 2853 ("The Due Process Clause of the Fourteenth Amendment sets the outer

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[Footnote continued from previous page]

"ha[s] the power to independently decide against buying" certain types of Daimler's vehicles, *Bauman*, 579 F.3d at 1096.

boundaries of a state tribunal's authority to proceed against a defendant.").

Moreover, our court now seemingly rejects respect for corporate separateness, a well-established "principle of corporate law deeply ingrained in our economic and legal systems." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotation marks omitted). It is "[a] basic tenet of American corporate law . . . that the corporation and its shareholders are distinct entities," over which jurisdiction must be individually established. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). "Where two corporations are in fact separate" — as they irrefutably are here — "permitting the activities of the subsidiary to be used as a basis for personal jurisdiction over the parent violates this principle and thus due process." *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000); *cf. J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2797 (2011) (Ginsburg, J., dissenting) ("A few points on which there should be no genuine debate bear statement at the outset. . . . [A]ll agree, [the parent company] surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly 'at home' in New Jersey.").

III

The problems with today's decision don't end there. The panel's holding perpetuates a split with at least six of our sister circuits, which do not even recognize the existence of the agency test. Moreover, our holding today is an affront to international comity and threatens the ability of the Executive Branch to execute its foreign affairs duties.

A

Not only does the panel's interpretation of the agency test fly in the face of due process, but the mere existence of the agency test is also contrary to the law of at least six of our sister circuits.[4] Some circuits, for example, use only the alter ego test. *See Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 648-49 (8th Cir. 2003) ("[P]ersonal jurisdiction can be based on the activities of the nonresident corporation's in-state subsidiary, but only if the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disre-

[4] It is also inconsistent with the Supreme Court's early decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925) (Brandeis, J.). There, the Court held that general personal jurisdiction may not be imposed on a foreign corporation merely because of the corporation's ownership of a subsidiary present in the forum state. *Id.* at 337; *see also id.* ("The corporate separation, though perhaps merely formal, was real. It was not pure fiction."). Though decided before the *International Shoe* line of cases, *Cannon Mfg. Co.* has never been overruled. *See generally Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Moreover, as the panel's flip-flop in this case clearly demonstrates, the agency test is far too manipulable to satisfy the requirements of due process. *See Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010) ("Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions."). Judges are not well equipped to make assessments about what a foreign corporation *might* do in *unforseen*, *hypothetical* scenarios, especially in the early stages of litigation. *See Bauman*, 644 F.3d at 920 (noting that the subsidiary's services must be "sufficiently important to [the parent] that they would almost certainly be performed by other means if [the subsidiary] did not exist, whether by [the parent] performing those services itself or by [the parent] entering into an agreement with a new subsidiary or a non-subsidiary national distributor for the performance of those services").

garded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego."); *Dalton v. R&W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990) ("Although the mere existence of a parent-subsidiary relationship will not support the assertion of jurisdiction over a foreign parent, there may be instances in which the parent so dominates the subsidiary that they do not in reality constitute separate and distinct corporate entities." (internal quotation marks omitted)); *see also Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362-63 (6th Cir. 2008). Other circuits similarly describe their test as analogous to the corporate law doctrine of piercing the corporate veil. *See IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 540 (7th Cir. 1998) (Posner, C.J.); *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 62-63 (4th Cir. 1993). Yet another circuit uses words like "agency" while clearly applying something more like the alter ego test. *See Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293-94 (11th Cir. 2000) ("For [plaintiffs] to persuade us that the district court had general personal jurisdiction over [the nonresident defendant] because of [its subsidiary's] activities in the United States, it would have to show that [the subsidiary's] corporate existence was simply a formality, and that it was merely [the parent's] agent.").

Whatever the precise name of the test, it is clear that the exercise of jurisdiction found to be proper here would be improper in many other circuits. Given that corporations must be able "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *Burger King Corp.*, 471 U.S. at 472, this case presents a question of substantial importance where a uniform rule is desirable, *cf. Mich-*

elin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) ("[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments.").

B

Finally, the panel's decision may also have unpredictable effects on foreign policy and international comity. In many European countries, for example, jurisdiction by imputation is discouraged. Council Regulation 44/2001, 2001 O.J. (L 012) 1 (EC). Nonetheless, several countries have enacted "retaliatory jurisdictional laws." Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987) ("These provisions empower national courts to exercise jurisdiction over foreign persons in circumstances where the courts of the foreigner's home state would have asserted jurisdiction."). For example, as a result of our court's holding today, an Italian court might be able to assert jurisdiction over a United States parent corporation based on that court's jurisdiction over a wholly owned Italian subsidiary.

Indeed, as the Solicitor General has noted, "foreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." Brief for the United States as Amicus Curiae Supporting Petitioners at 33, *Brown*, 131 S. Ct. 2846; *see also id.* at 12 ("[E]xcessive assertion of general jurisdiction potentially threatens particular harm to the United States' foreign trade and diplomatic interests."). Naturally, in the past, the Supreme Court has taken such issues to heart. *See, e.g.*, *Asahi Metal Indus. Co. v.*

Superior Court, 480 U.S. 102, 115 (1987) (urging courts "to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by [state] court[s]"); *see also id.* ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." (internal quotation marks omitted)). Yet the panel brushed aside these concerns, which deserve full consideration.

IV

In sum, Daimler is hardly "at home" in California when sued only for its Argentinian subsidiary's activities in Argentina. *Brown*, 131 S. Ct. at 2851. Our court's holding represents a breathtaking expansion of general personal jurisdiction, which is unwarranted in light of Supreme Court precedent, the precedent of our sister circuits, and our own precedents. Moreover, today's decision presents a gratuitous threat to our nation's economy, foreign relations, and international comity.

I respectfully dissent; our court should have granted the petition for rehearing en banc.

APPENDIX F

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA BAUMAN; GREGORY GRECO; JOSEFINA NUNEZ; GABRIELE NUNEZ; MIRIAM NUNEZ; SILVIA NUNEZ; EMILIO GUILLERMO PESCE; MIRTA HAYDEN ARENAS; GRACIELA GIGENA; GUILLERMO ALBERTO GIGENA; NURIA GIGENA; AMELIA SCHIAFFO; ELBA LECHNER; ANUNCIACION SPALTRO DE BELMONT; HECTOR RATTO; EDUARDO OLASIREGUI; RICARDO MARTIN HOFFMAN; EDUARDO ESTIVILLE; ALFREDO MANUEL MARTIN; JUAN JOSE MARTIN; JOSE BARREIRO; ALEJANDRO DAER;
Plaintiffs-Appellants,

v.

DAIMLERCHRYSLER CORPORATION and DAIMLERCHRYSLER AG,
Defendants-Appellees.

No. 07-15386

D.C. No. CV-04-00194-RMW Northern District of California, San Jose

ORDER

Filed May 6, 2010

Before: Mary M. Schroeder, Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges.

ORDER

Appellants' Petition for Rehearing is GRANTED. The opinion filed on August 28, 2009 is vacated. This case shall be reheard by the 3-judge panel the week of June 21, 2010, in Pasadena, California. The date and time of oral argument will be set soon, and counsel should inform this court of any potential conflicts immediately.

The parties are ordered to submit supplemental briefs addressing the following questions:

1. Is "control" an element of this court's agency test for personal jurisdiction? If so, how much control is required? If our precedent is unclear, how much control should be required?

2. If the panel concludes that an agency relationship exists, would an exercise of general jurisdiction over defendants be reasonable in this case?

These supplemental briefs shall be no longer than ten pages or 2800 words, and shall be submitted no later than 14 days after the entry of this order. Parties who are registered for Appellate ECF must file the supplemental brief electronically. Parties who are not registered Appellate ECF filers must file the original supplemental brief plus seven paper copies.

The Petition for Rehearing En Banc is denied as moot without prejudice to filing a new petition for rehearing en banc.

OPPOSITION BRIEF

JUL 11 2012

No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Ninth Circuit err in holding that the Due Process Clause permitted a court in California to exercise personal jurisdiction over petitioner based on the facts of this particular case, where petitioner, among other things, created a wholly owned subsidiary whose only purpose is to sell billions of dollars' worth of petitioner's vehicles in the state for petitioner's sole benefit, subject to petitioner's pervasive authority?

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STATEMENT OF THE CASE

Petitioner makes billions of dollars every year selling its luxury cars in California. Rather than sell those cars through a division of its company, petitioner created a wholly owned subsidiary that operated in materially the same way as a subdivision would: the subsidiary and parent company had the same chairman; the subsidiary sold cars solely for the parent company; the parent company set prices for the cars and had authority over virtually all aspects of the subsidiary's operations; and all profits went to the parent. The Ninth Circuit held that in light of the specific facts of this case, courts in California had general jurisdiction over both subsidiary and parent.

1. Respondents are former employees and representatives of deceased employees of the González Catán plant of Mercedes-Benz Argentina, a wholly owned subsidiary of DaimlerBenz, petitioner's predecessor-in-interest. Pet. App. 3a. During the period of terror perpetrated by Argentina's military dictatorship between 1976 and 1983 – known as the "Dirty War" – Mercedes-Benz Argentina identified respondents as "subversives" or "agitators" to state security forces stationed within its plant, knowing that respondents would be kidnapped, detained, tortured, or murdered as a result. *Id.* 3a-4a & n.3. After respondents were arrested or "disappeared," Mercedes-Benz Argentina hired the police chief behind the raids as its Chief of Security, and provided him with legal representation when he was subsequently accused of human rights abuses. *Id.* 3a-4a.

2. Respondents brought suit in 2004 in the Northern District of California, raising claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. First Am. Compl. ¶ 57. Respondents also brought claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina. *Id.* ¶ 72-79. They alleged that petitioner was responsible for the acts of its Argentinean subsidiary, and that suit was properly brought in California in light of the substantial and systematic business petitioner conducts in that state through its wholly owned subsidiary, Mercedes-Benz USA (MBUSA). Pet. App. 95a, 104a.

Respondents originally attempted to serve process at petitioner's headquarters in Stuttgart, Germany. A German trial court allowed service, but its order was stayed pending an appeal. Pet. App. 4a & n.4. Respondents then attempted to serve petitioner in the United States in light of its 1998 merger with American auto manufacturer Chrysler Corporation, which formed DaimlerChrysler AG (DCAG). *Id.* 5a. In a proxy statement to its shareholders following the merger, DCAG stated that it would "maintain two operational headquarters – one located at the current Chrysler headquarters . . . [in] Auburn Hills, Michigan . . . and one located at the current Daimler-Benz headquarters . . . [in] Stuttgart, Germany." *Id.* The company's website further announced that the former Chairmen/CEOs from Chrysler and Daimler-Benz were "Co-Chairmen and Co-Chief Executive Officers." *Id.* Each

maintained "offices and staff in both" the Auburn Hills and Stuttgart headquarters. *Id.* 6a.

Respondents therefore served petitioner at its headquarters in Auburn Hills, Michigan. Petitioner attempted to quash service but withdrew its motion after respondents produced documents showing that the Michigan and Stuttgart offices were "dual operational headquarters." Pet. App. 5a-6a.

3. In the Northern District of California, petitioner moved to dismiss for lack of personal jurisdiction. Although the court found it a "close question," it granted petitioner's motion. Pet. App. 15a-17a.

4. On appeal, the Ninth Circuit reversed. The court of appeals observed that "[t]here are two types of personal jurisdiction: general and specific." Pet. App. 19a. Because DCAG's contacts with California did not "give rise to the cause of action before the court," the Ninth Circuit considered only general jurisdiction. *Id.* 19a-20a. The court explained that the basic question was whether petitioner's "continuous corporate operations within [the] state are . . . so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely distinct from those activities." *Id.* 20a (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). In this case, the court held that by establishing a wholly owned subsidiary in California to conduct a core aspect of its business and by retaining pervasive authority over its operations, petitioner manifested sufficient presence in the state to permit the exercise of jurisdiction. *Id.* 43a-44a.

The court noted that both parties agreed that the subsidiary, MBUSA, maintained sufficient contacts with California to permit the exercise of general jurisdiction over it. Pet. App. 21a n.11. The question was whether those contacts also supported general jurisdiction over petitioner, MBUSA's parent company. The court of appeals explained that under circuit precedent, "if one of two *separate* tests is satisfied, we may find the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum." *Id.* 21a (emphasis in original). First, the "alter ego" test – not at issue here – applies when "there is such unity of interest and ownership that the separate personalities of the two entities no longer exist." *Id.* (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001)).

The second test, "which *is* applicable here, is the 'agency' test." Pet. App. 21a (emphasis in original). That test, the court explained, has two prongs. The first asks if the tasks performed by the subsidiary "are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available." *Id.* 24a-25a (emphasis omitted) (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001)). "The purpose of examining sufficient importance is to determine whether the actions of the subsidiary can be understood as a manifestation of the parent's presence." *Id.* 23a (citing *Int'l Shoe*, 326 U.S. at 318). In this case, the court easily concluded that MBUSA conducted a core aspect of petitioner's business.

"Selling Mercedes-Benz vehicles is a critical aspect of DCAG's business operations," the court observed, and "the United States market accounted for 19% of the sales of Mercedes-Benz vehicles worldwide." *Id.* 25a. "MBUSA's sales in California alone accounted for 2.4% of DCAG's total worldwide sales." *Id.*

But the court explained that the Due Process Clause is not satisfied simply because a subsidiary conducts business that is sufficiently important to the parent company. In addition, "[c]ontrol . . . plays a role in determining whether personal jurisdiction is established because control is a traditional element of agency under common law principles." Pet. App. 26a. In particular, the control prong requires that "both the principal and the agent must manifest assent to the principal's right to control the agent." *Id.* 27a (emphasis omitted).

In this case, the Ninth Circuit determined that DCAG enjoyed the "right to control nearly every aspect" of its subsidiary's operations. Pet. App. 23a. The same person, Dieter Zetsche, was the Chairman of both MBUSA and DCAG. *Id.* 11a. Moreover, under the companies' General Distributor Agreement, MBUSA could not replace key personnel, alter its management control or ownership interests, change its name or the form of its legal entity, or move the location of its principal place of business without DCAG's approval. *Id.* 11a, 13a. DCAG also retained the right to unilaterally set the prices at which MBUSA sold vehicles and to specify the amount of working capital MBUSA must maintain. *Id.* 13a-14a. Its control extended even to minute aspects of MBUSA's operations, including the "type,

design and size" of any signs used by MBUSA. *Id.* 13a.

Finally, the Ninth Circuit held, even if the agency test is met, the court must still independently determine "whether the assertion of jurisdiction is 'reasonable.'" Pet. App. 30a. The court of appeals therefore applied a seven-factor reasonableness test derived from *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). Pet. App. 30a-31a. Among other things, the court considered that DCAG had "purposefully and extensively interjected itself into the California market through MBUSA," and had itself engaged in extensive litigation in the state, established a research and development center in Palo Alto, and listed itself on the Pacific Stock Exchange in San Francisco. *Id.* 31a-32a. The court further explained that it would not be a significant burden on DCAG to litigate in California, since "technological advances" have lessened the cost for a multinational corporation to litigate there and because DCAG already had permanent counsel in California. *Id.* 32a-33a. Nor would the litigation pose a sufficient conflict with German sovereignty, given that petitioner had "manifested an intent to serve and to benefit from the United States market," which accounted for "nearly 50% of DCAG's overall revenue" and "1% of [Germany's] GDP." *Id.* 33a-34a. Finally, the court of appeals found that Argentina and Germany would not provide adequate alternative fora. *Id.* 39a-40a.

5. The Ninth Circuit subsequently denied a petition for rehearing en banc. Pet. App. 135a.

6. While the petition for rehearing was pending, this Court granted certiorari in two cases presenting questions relating to the federal claims in this action.

The Court decided the first, *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), on April 18, 2012, holding that the TVPA "authorizes liability solely against natural persons." *Id.* at 1708. Because petitioner, a corporation, is the only defendant in this case, *Mohamad* extinguished respondents' TVPA claims.

The viability of respondents' remaining federal claims, brought under the ATS, will be resolved in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491. This Court originally heard oral argument in *Kiobel* on February 28, 2012, on the question whether corporations, like petitioner, can be held liable under the ATS. It then restored the case to the calendar for reargument in October Term 2012 on the question whether the ATS "allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States," as alleged in this case. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012).

REASONS FOR DENYING THE WRIT

Petitioner has long participated in the California market for luxury vehicles through a wholly owned subsidiary that serves no function other than to sell petitioner's vehicles in the United States. The Ninth Circuit held that based on the particular facts of this case, a California district court had general jurisdiction over petitioner. That holding is correct and does not warrant review by this Court. By conducting substantial business in California through a subsidiary it wholly owns and over which it retains comprehensive authority, petitioner has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987). It therefore "does not offend 'traditional notions of fair play and substantial justice,'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), for courts in that state to exercise general jurisdiction over petitioner.

Petitioner claims that in reaching this conclusion, the Ninth Circuit applied a test that "at least five circuits . . . have categorically rejected." Pet. 10 (emphasis omitted). Petitioner further claims that the majority of circuits to have addressed the question have held instead that "in order for one corporation's jurisdictional contacts to be imputed to another corporation, the two corporations must be alter egos of each other that fail to adhere to the requirements of their separate corporate identities." *Id.* 10-11. Neither assertion is correct. Most of the decisions petitioner cites simply hold that satisfaction of the "alter ego" test is *sufficient* to establish general

jurisdiction; they do not consider, much less reject, the possibility that an agency relationship may, in appropriate circumstances, also satisfy the Due Process Clause. When confronted with that question, all but one circuit has sided with the Ninth Circuit.

That lopsided and nascent conflict does not warrant review and, in any event, this case provides an especially poor vehicle for deciding any general jurisdiction question. This Court's impending decision in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, could raise complicated jurisdictional questions that may make the Court's resolution of any general jurisdiction question immaterial to the outcome of the case. Those questions are best resolved in the first instance in the district court, to which the case has been remanded for further proceedings. Moreover, interlocutory review by this Court would have little practical consequence for the litigation. Because petitioner maintained a corporate headquarters in Michigan at the time this complaint was filed, a decision in its favor on general jurisdiction would at most result in a transfer of the case from one federal court to another.

I. There Is No Substantial Division Among The Circuits.

There is no basis for petitioner's claim that the circuits are "deeply divided over the circumstances in which due process permits the imputation of the jurisdictional contacts of a corporate subsidiary to an out-of-state parent corporation." Pet. 10. All circuits agree that a parent is subject to general jurisdiction if its subsidiary in the forum state is simply its "alter ego." A majority of circuits to have considered the

question have also held that some forms of an "agency" relationship may provide an additional basis for exercising general jurisdiction over a parent company. Contrary to petitioner's claims, only one circuit has considered and rejected that view, and its decision is less than a year old. Such a recent and shallow conflict does not warrant this Court's review.

A. The Second, Ninth, And Eleventh Circuits Have Adopted An Agency Test.

As petitioner notes, the Second and Ninth Circuits have long held that the alter ego test is not the exclusive means of demonstrating that a corporation has sufficient minimum contacts with the forum state by virtue of its ownership of and authority over a subsidiary. Instead, both have adopted an agency test under which courts may exercise jurisdiction over a foreign parent corporation where, among other requirements, an in-state subsidiary "renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important . . . that the corporation itself would perform equivalent services if no agent were available," *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001);[1] *see also Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 422-23 (9th Cir. 1977).

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[1] Although the Second Circuit in *Wiwa* adopted this agency test as an interpretation of New York's long-arm statute, it also held that "nothing in the Due Process Clause precludes New York from exercising jurisdiction over the defendants." 226 F.3d at 99.

Petitioner acknowledges that the Eleventh Circuit applies an agency test, but insists that it requires plaintiffs "to meet a stringent standard similar to the alter-ego test." Pet. 15-16 (citing *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000)). But whatever early cases may have suggested, recent decisions in the Eleventh Circuit have expressly embraced the Second Circuit's agency test. *See, e.g.*, *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1275 (11th Cir. 2002) (adopting *Wiwa* test verbatim); *Stubbs v. Wyndham Nassau Resort & Crystal Palace*, 447 F.3d 1357, 1361 (11th Cir. 2006) (explaining that "our precedent . . . has been extended to other principal-agent relationships, when the resident corporation acts on behalf of its foreign affiliates") (citing *Meier*).

B. The First, Fourth, Fifth, Sixth, And Seventh Circuits Have Not Yet Decided Whether To Adopt An Agency Test In Addition To An Alter Ego Test.

Petitioner claims that the majority of circuits to consider the question have "categorically *rejected* the agency framework." Pet. 10 (emphasis in original). That is incorrect. The decisions petitioner cites from the First, Fourth, Fifth, Sixth, and Seventh Circuits have held or suggested that an alter ego relationship between parent and subsidiary may be sufficient to establish general jurisdiction over the parent. But in none of these cases did the court consider, much less reject, the proposition that an agency affiliation short of an alter ego relationship might be sufficient to establish jurisdiction over a foreign parent company based on the contacts of its in-state subsidiary, likely because the parties in those cases appear not to have

raised the issue. *See Miller v. Honda Motor Co.*, 779 F.2d 769, 772-73 (1st Cir. 1985); *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433-34 (4th Cir. 2011); *Jackson v. Tanfoglio Giuseppe, S.R.L.*, 615 F.3d 579, 586 (5th Cir. 2010); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008); *Central States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 943-44 (7th Cir. 2000). In short, while these circuits have held that an alter ego relationship is *sufficient* they have not held that it is *necessary*.

There is no basis to speculate that any of these courts, when confronted with the question, would reject the rule applied by the Ninth Circuit in this case. Indeed, the First and Seventh Circuits have previously indicated that they are open to theories beyond the alter ego test. In *Donatelli v. National Hockey League*, 893 F.2d 459 (1st Cir. 1990), the First Circuit held that due process can permit the assertion of jurisdiction over corporate parents due to the contacts of their subsidiaries even when "corporate entities are distinct and their veils unpierced." *Id.* at 465. The court noted by way of example that "[s]ometimes, the parent has utilized the subsidiary in such a way that an agency relationship between the two corporations can be perceived – and that is enough" to warrant the

exercise of general jurisdiction. *Id.* at 466 (citing *Wells Fargo*, 556 F.2d at 420).[2]

Likewise, in *IDS Life Insurance Co. v. SunAmerica Life Insurance Co.*, 136 F.3d 537 (7th Cir. 1998) (Posner, C.J.), the court found no jurisdiction over a foreign parent corporation but stated that "[i]f the subsidiaries were acting as [the parent's] Illinois agent in the sense of conducting [the parent's] business rather than their own business, the parent could be sued." *Id.* at 541. The court explained that "a corporation should not be able to insulate itself from the jurisdiction of the states in which it does business by the simple expedient of separately incorporating its sales force and other operations in each state." *Id.*

C. The Eighth Circuit Is Alone In Explicitly Rejecting The Agency Test.

The only court of appeals to have directly considered and rejected the agency test is the Eighth Circuit – and its rule is less than a year old. *See Viasystems, Inc. v. EBM-Pabst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011). Further, because *Viasystems* involved a highly attenuated

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[2] The First Circuit's earlier decision in *Miller v. Honda Motor Co.*, 779 F.2d 769 (1st Cir. 1985), does not suggest, as petitioner claims, that the First Circuit would construe the Due Process Clause to "require a plaintiff seeking to establish 'agency' to meet a stringent standard similar to the alter-ego test." Pet. 15. In *Miller*, the court denied the plaintiff's request to "find that American Honda is in fact an agent of its Japanese parent" on state-law, not federal due process, grounds. *Id.* at 772.

parent-subsidiary relationship that was "confined to a two-steps-removed 28-percent interest," *id.* at 597, it is possible that the Eighth Circuit would find the Due Process Clause satisfied in a case such as this, where the parent company retained a higher "degree of control and domination" over the subsidiary, *id.* at 596.

II. This Case Is An Exceptionally Poor Vehicle For Deciding Any Question Of General Personal Jurisdiction.

Even if petitioner presented a conflict meriting this Court's review, this case would be an exceptionally poor vehicle for resolving it. This Court "generally await[s] final judgment in the lower courts before" granting review. *Va. Military Inst. v. United States*, *cert. denied*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). That practice is particularly warranted in this case. At this time, and on the current record, there is substantial doubt that a decision on the question presented would have any material impact on the outcome of this litigation.

A. This Court's Decision In *Kiobel v. Royal Dutch Petroleum Co.* Could Raise Significant Jurisdictional Questions That Should Be Settled In The Lower Courts And May Render Any Decision On Personal Jurisdiction Immaterial To The Outcome Of This Case.

1. In *Kiobel*, this Court will decide two pertinent questions: (1) whether corporations can be held liable under the ATS, and (2) whether, or under what circumstances, the ATS extends to violations that

occur outside the territory of the United States. Because the sole defendant in this case is a corporation sued for conduct occurring overseas, if this Court rules in the defendant's favor on either issue in *Kiobel*, the Court will eliminate the only remaining federal question in the case.[3]

2. In the absence of continuing federal question jurisdiction, the issue would arise whether the district court nonetheless has diversity jurisdiction to resolve the remaining claims based on state and Argentinean law, and, if not, whether it should exercise its discretion to retain supplemental jurisdiction over the remaining claims. Both issues should be decided in the first instance by the lower courts and, if resolved in petitioner's favor, would render the Ninth Circuit's personal jurisdiction holding immaterial to the outcome of the case.

The existence of diversity jurisdiction turns on legal and factual questions about whether petitioner maintained a "principal place of business" in Michigan after its merger with Chrysler. 28 U.S.C. § 1332(c)(1) (providing that, for purposes of diversity jurisdiction, "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business."). The Ninth Circuit noted, but did not resolve, that question below. Pet. App. 6a n.6. If the courts in this

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[3] Petitioner's other federal claim, under the TVPA, was extinguished by this Court's recent decision in *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), which held that the TVPA does not apply to corporations, *id.* at 1706.

case determined that petitioner is a citizen on Michigan, there would be diversity jurisdiction to resolve respondents' state and Argentinean law claims, even if *Kiobel* eliminates respondents' ATS claims. Petitioner would be free to seek certiorari on the question of personal jurisdiction after final judgment, if the issue still mattered.

If, on the other hand, there was no diversity jurisdiction, there could still be supplemental jurisdiction over the remaining non-federal claims. *See* 28 U.S.C. § 1367. But whether to exercise that jurisdiction would be a discretionary decision for the trial court. *See id.* § 1367(c) ("The *district courts* may decline to exercise jurisdiction if" the federal claims in a case have been dismissed) (emphasis added); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). That discretionary decision could render the question of personal jurisdiction irrelevant – the district court's refusal to exercise supplemental jurisdiction would end any further litigation in the Northern District of California just as effectively as a decision by this Court finding no personal jurisdiction.

3. Although the Court's decision in *Kiobel* could have important consequences for the disposition of this case, that is not a reason to hold this petition pending the Court's decision in *Kiobel*. Because the petition is interlocutory, the district court will already be empowered to give effect to *Kiobel* without the need for a remand from this Court. Moreover, vacating the Ninth Circuit's personal jurisdiction decision for further consideration in light of *Kiobel* would serve no purpose, as *Kiobel* involves no question of personal jurisdiction. As a consequence, if the Court vacated and remanded the decision in

this case for reconsideration in light of *Kiobel*, the Ninth Circuit would reasonably reinstate its prior jurisdictional ruling and allow the district court to resolve *Kiobel*'s effect on other aspects of the case – precisely the same outcome as a denial of certiorari.

B. A Decision On The Question Presented Would At Most Determine Only Which Federal Court Will Hear Respondents' Claims.

The petition should be denied for the additional reasons that even if this Court granted certiorari and held that there was no personal jurisdiction over petitioner in California, that would not end the case. Instead, the case would be transferred to Michigan, where personal jurisdiction would be available even setting aside petitioner's relationship with its subsidiaries.

If a federal district court

> finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631; *see also id.* § 1406 (similar for lack of venue).[4]

In this case, if this Court were to hold that California lacks personal jurisdiction over petitioner, the case would appropriately be transferred rather than dismissed because Michigan does have such jurisdiction.[5] For corporations, having a "principal place of business" within a state "indicates general submission to a State's powers," and therefore establishes the state's general jurisdiction over the corporation. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011); *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011). And in this case, even disregarding the jurisdictional contacts of petitioner's subsidiaries, at the time this litigation commenced, petitioner *itself* had established a principal place of business in Michigan as a result of its merger with Chrysler Corporation. *See* Pet. App. 5a-6a & n.6.[6]

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[4] Whether the transfer is seen as correcting a lack of jurisdiction (addressed in Section 1631) or venue (addressed in Section 1406), as respondents argued below, is immaterial as the transfer rule in either case is materially the same.

[5] The district court rejected respondents' transfer request on the ground that they should have raised the issue earlier in the litigation, Pet. App. 92a, and because a transfer "would not 'be in the interest of justice' because personal jurisdiction is lacking over DCAG," *id.* 93a. Respondents challenged both determinations on appeal but the Ninth Circuit did not reach either question. *See* Pet. App. 17a n.9.

[6] The fact that DCAG also maintained a headquarters in Germany does not change the analysis. For example, in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), the

III. Petitioner Has Failed To Show That Any Alleged Difference In Courts' Tests For General Jurisdiction Over Corporate Parents Has A Significant Practical Effect.

The petition does not warrant review in any event because petitioner's claim of dire consequences resulting from the Ninth Circuit's alleged "boundless notion of general personal jurisdiction" is unfounded. Pet. 25.

A. Petitioner Mischaracterizes The Ninth Circuit's General Jurisdiction Test As Far Broader Than It Is.

Petitioner repeatedly mischaracterizes the Ninth Circuit's test as providing that "an agency relationship can be established . . . whenever the subsidiary is performing services on behalf of the parent corporation that the parent would perform through some other means if the subsidiary were no longer available." Pet. 11; *see also id.* i. But that description omits two significant additional requirements that in practice eliminate most of the objectionable hypotheticals petitioner raises.

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president and general manager of a Philippine mining operation maintained an office in Ohio in which he kept files, conducted operational meetings, and otherwise carried on "a continuous and systematic, but limited, part of its general business." *Id.* at 438. This "limited" business was enough to allow Ohio to exercise general jurisdiction consistent with due process. *Id.*; *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984) (citing *Perkins* with approval). Here, DCAG's presence in Michigan is much more significant than the defendant's in *Perkins*.

First, the Ninth Circuit requires not only that the subsidiary perform a sufficiently important function, but also that the parent has a "right to control" the subsidiary. Pet. App. 27a. Accordingly, when a distributor is truly independent, its contacts do not subject a parent company to general jurisdiction, even if it performs a critical function. Here, the Ninth Circuit found personal jurisdiction only because DCAG retained an extraordinary degree of authority over "*nearly all aspects* of MBUSA's operations." *Id.* 29a (emphasis added). To start, petitioner's Chairman also served as the Chairman of MBUSA. *Id.* 11a. In addition, DCAG had authority over, among other things, "which management personnel are appointed to run MBUSA"; "which management personnel positions shall exist at MBUSA"; "the prices that MBUSA must pay to DCAG"; "the prices that MBUSA may charge to its Authorized Resellers"; and "the working capital level and financing capability level that MBUSA must maintain." *Id.* "If that exhaustive list were not enough, DCAG also has the right to require MBUSA to execute '*any agreement relating to . . . any other matter related to this Agreement* . . . as long as those new Agreements are not an 'unreasonable burden' on MBUSA." *Id.* 30a.

Second, the Ninth Circuit has recognized that the forum state would not normally have an interest in adjudicating a suit when "the events at issue did not take place in California and . . . the plaintiffs are not California residents." Pet. App. 35a (citation omitted). To guard against inappropriate exercises of jurisdiction, therefore, even after finding a sufficient agency relationship, a court must also determine that

"the assertion of jurisdiction is 'reasonable.'" *Id.* 30a (citation omitted). Among other factors, the Ninth Circuit considers "the extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; [and] the forum state's interest in adjudicating the suit." *Id.* 31a.

Here, the Ninth Circuit found jurisdiction to be reasonable based on factors that are unlikely to lead to the "boundless" expansion of personal jurisdiction petitioner predicts, Pet. 25. In contrast to the Australian contractor example raised by petitioner, *id.*, or the small businesses hypothesized by amicus,[7] the Ninth Circuit explained that "DCAG has purposefully and extensively interjected itself into the California market through MBUSA" – a market which alone "account[s] for 2.4% of DCAG's total worldwide sales," Pet. App. 32a. Moreover, DCAG was no stranger to the forum state, having "initiat[ed] lawsuits in California courts to challenge the state's clean air laws and to protect DCAG's patents and other business interests." *Id.* 31a (quotation marks omitted). Indeed, "DCAG has retained permanent counsel in California." *Id.* This case was also unusual, the court pointed out, because respondents' claims are based in international law and "federal courts . . . have a strong interest in adjudicating and redressing human rights abuses" that is absent in ordinary business disputes or tort litigation. *Id.* 36a.

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[7] *See* Chamber of Commerce Br. 11-12.

Given these limitations, the question presented by the petition – "[W]hether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation *based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State*," Pet. i (emphasis added) – does not arise on the facts of this case. That in itself is reason enough to deny review.

B. Other Principles Work In Tandem With Limitations On General Jurisdiction To Protect Against Unwarranted Exercise Of Jurisdiction Over Foreign Defendants.

Even beyond the significant protections built into the agency test, other principles ensure that few foreign defendants will be haled into court under the agency test for events occurring abroad based on ownership of a U.S. subsidiary.

First, *forum non conveniens* enables a court to dismiss a suit, even where jurisdiction and venue requirements are met, "on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). Federal courts frequently invoke *forum non conveniens* in declining to exercise jurisdiction over a foreign defendant, including large international corporations. *See, e.g., In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 809 F.2d 195, 202 (2d Cir. 1987) (affirming dismissal of tort suit arising out of industrial accident in India when Indian courts provided a "reasonably adequate alternative forum"); *Fagan v. Deutsche Bundesbank*,

438 F. Supp. 2d 376, 384 (S.D.N.Y. 2006) (same, for a defamation suit arising out of statements made in Germany to a German newspaper). Thus, even if courts could exercise general jurisdiction over the European patent dispute or Asian products liability case, Pet. 25, courts often would abstain from exercising jurisdiction in such cases under *forum non conveniens* principles.

Second, courts have declined to exercise jurisdiction out of concerns for international comity – that is, respect for the laws and interests of another sovereign. *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817-20 (1993) (Scalia, J., dissenting). For example, in the antitrust context, several courts of appeals have "tempered the extraterritorial application of the Sherman Act with considerations of 'international comity.'" *Id.* at 817 (citing five cases from four circuits); *cf. also Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 65 (S.D. Tex. 1994) (dismissing a suit brought by Ecuadoreans regarding an environmental disaster in Ecuador for comity and *forum non conveniens* reasons).

Third, some U.S. courts have recognized the customary international law doctrine of the exhaustion of local remedies. Under that principle, plaintiffs generally "must have exhausted any remedies available in the domestic legal system" before bringing suit in the United States. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). Thus, if a foreign plaintiff sues a foreign defendant for breach of a contract executed in another country,

the exhaustion doctrine could enable an American court to dismiss the suit even if it found general jurisdiction over the defendant.[8]

C. The Agency Test Has Been In Place For Decades Without Triggering The Dire Consequences Predicted By Petitioner.

Given all these limitations, petitioner has no basis for its predictions that courts within the Ninth Circuit will soon be exercising jurisdiction over "an intellectual property dispute regarding infringement of a European patent in Europe, a dispute involving a contract made and performed in Australia, or a products-liability claim arising out of an accident in Asia." Pet. 25. Moreover, petitioner's need to construct its parade of horribles from hypotheticals is itself telling. Courts in the Second and Ninth Circuits have applied the agency test for many years. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 419-20 (9th Cir. 1977). Yet, petitioner has not pointed to a single other *actual* case illustrating what it insists is an inevitable jurisdictional disaster.

In fact, by respondents' count, only a handful of more than seventy district court cases in the Second Circuit citing *Wiwa* and considering an agency argument have found general jurisdiction over a

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[8] The lower courts have yet to determine whether any of these doctrines preclude the litigation in this case, another reason why interlocutory review is premature.

foreign company. At the same time, courts within the Ninth Circuit regularly dismiss suits against foreign defendants for lack of personal jurisdiction. *See, e.g.*, *Doe v. Unocal Corp.*, 248 F.3d 915, 920 (9th Cir. 2001); *Dougherty v. Lincare, Inc.*, No. CV10-0978 PHX DGC, 2010 U.S. Dist. LEXIS 83993, at *8-9 (D. Ariz. Aug. 13, 2010); *Cargnani v. Pewag Austria G.m.b.H.*, No. CIV. S-05-0133 WBS JFM, 2007 U.S. Dist. LEXIS 8210, at *20-23 (E.D. Cal. Feb. 2, 2007); *Amirhour v. Marriott Int'l, Inc.*, No. C 06-01676 WHA, 2006 U.S. Dist. LEXIS 100290, at *5-8 (N.D. Cal. Dec. 4, 2006).

The dissent from the denial of rehearing en banc suggested that this may change because, in its view, the panel below "drastically expand[ed] our test for personal jurisdiction." Pet. App. 137a. There is no basis for that claim. *See id.* 20a-23a & n.12. And in fact, since the decision in this case, district courts have continued to decline to exercise general jurisdiction over foreign parent corporations under the agency test. *See Troll Busters LLC v. Roche Diagnostics GmbH*, No. 11cv56-IEG(WMc), 2011 U.S. Dist. LEXIS 98441, at *40-43 (S.D. Cal. Aug. 31, 2011); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07–1827 SI, 2011 U.S. Dist. LEXIS 96739, at *9-20 (N.D. Cal. Aug. 29, 2011); *Bixby v. KBR, Inc.*, 3:09-CV-632-PK, 2011 U.S. Dist. LEXIS 79156, at *15-18 (D. Or. June 16, 2011). But in any event, should the en banc dissenters' predictions of expanded exercise of jurisdiction come to pass, this Court will have ample opportunity to grant review in a later case.

IV. The Decision Below Is Correct.

Finally, certiorari is not warranted because the court of appeals correctly determined that exercising general jurisdiction over petitioner is consistent with the Due Process Clause.

The Ninth Circuit, like all courts, begins its jurisdictional inquiry with a presumption of corporate separateness. Thus, as a general matter, the mere "existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries' minimum contacts with the forum." *Doe v. Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001). At the same time, the Ninth Circuit has correctly discerned that it sometimes comports with "traditional notions of fair play and substantial justice," *Int'l Shoe Co. v. Washington*, 326 U.S 310, 316 (1945) (quotation marks omitted), to exercise jurisdiction over a foreign parent when it has the right to control a wholly owned subsidiary, operating in the forum state solely for the benefit of the parent company. And the court correctly decided that such jurisdiction was appropriate on the particular facts of this case.

A. The District Court's Exercise Of General Personal Jurisdiction Over Petitioner Comports With Traditional Notions Of Fair Play And Substantial Justice.

1. Under this Court's "canonical opinion" in *International Shoe*,[9] the Due Process Clause permits a court to exercise jurisdiction over an out-of-state corporation if it "ha[s] certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" 326 U.S. at 316. "The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined *in each case*." *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952) (emphasis added).

When a company has "continuous and systematic general business contacts" in a forum state, it is reasonable for the state to exercise general jurisdiction over it, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984), because that the corporation has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987) (quoting

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[9] *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011).

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

2. Under these precedents, the Ninth Circuit correctly held that in some circumstances, a company may create sufficient contacts with a forum state by forming and controlling a wholly owned subsidiary to conduct essential operations in the state entirely for the benefit of the parent corporation.

When a foreign company establishes a permanent *subdivision* within a foreign state – a sales office, for example – it is uncontroversial that the foreign company's contacts are "sufficiently continuous and systematic" to justify general jurisdiction, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011). The Constitution does not demand that states recognize the formal division of operations within a corporation for purposes of personal jurisdiction. However the company chooses to organize its operations, it nonetheless has purposely availed itself of the benefits and protections of the state, including its laws and economic markets. It would be entirely unfair to allow the company to enjoy those benefits without accepting the concomitant responsibility of submitting to the jurisdiction of the state's courts.

Moreover, even petitioner acknowledges that the greater separation entailed by turning the subdivision into a wholly owned subsidiary does not inevitably strip a state of its authority to exercise jurisdiction over the parent. Petitioner admits that the Due Process Clause permits a state to ignore this formal division when the foreign parent company and its in-state subsidiary are "the same entity," such that the two are alter egos. Pet. 13-14. While the

two entities may be legally distinct for other purposes, because the distinction has no relevance for the purposes of the Due Process Clause, states are not bound by any principles of "corporate separateness" to forgo jurisdiction. *Id.* 9.

Those same constitutional purposes permit a court to exercise jurisdiction when a company conducts an essential part of its business in the state through a wholly owned subsidiary over which it retains pervasive authority. In this case, petitioner sent a wholly owned subsidiary to California to conduct business on its behalf. The subsidiary was owned entirely by petitioner; it operated only for the benefit of petitioner; and petitioner had the pervasive right to control its subsidiary's operations. For all practical – and constitutional – purposes, the subsidiary operated no differently than would a subdivision. Any separation between parent and subsidiary was purely formal. And as a result, petitioner, through its subsidiary, maintained "continuous and systematic general business contacts," *Helicopteros*, 466 U.S. at 416, that make exercise of jurisdiction over it entirely fair. Indeed, DCAG persistently reaped significant benefits and protections from California's laws, including bringing suit in its courts and making billions of dollars of sales in that state alone. *See supra* III.A.

B. The Due Process Clause Does Not Enshrine The Alter Ego Test As The Only Permissible Standard For Exercising General Jurisdiction Over A Parent Corporation.

Petitioner nevertheless asserts that the alter ego standard is the only constitutionally permissible means of establishing general jurisdiction over a parent corporation based on the contacts of a subsidiary. This argument has no basis in this Court's precedent and does not accurately reflect the concerns of fair play and substantial justice underlying this Court's personal jurisdiction jurisprudence.

1. As an initial matter, petitioner's suggestion that *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), adopted the alter ego test under the Due Process Clause is unfounded. *See* Pet. 20-21. First, *Cannon* was decided as a matter of federal common law, not constitutional law. Because Congress had not yet enacted any statute or rule of civil procedure governing personal jurisdiction in federal court, this Court was required to develop a rule as a matter of federal common law. 1 BLUMBERG ON CORPORATE GROUPS § 24.01, at 24-4 (2d ed. 2012) (BLUMBERG). The Court went out of its way to explain that in doing so it was not addressing any "question of the constitutional powers of the State, or of the federal Government." *Cannon*, 267 U.S. at 336. In fact, this Court has never referenced *Cannon* as relevant authority in its discussion of due process limitations to personal jurisdiction in *International Shoe* and its progeny.

Second, and in any event, *Cannon* did not adopt the alter ego test petitioner advances. The only question presented in the case was "whether the corporate separation carefully maintained *must be ignored* in determining the exercise of jurisdiction," 267 U.S. at 336 (emphasis added). The Court held that the answer was "no": the "use of a subsidiary *does not necessarily* subject the parent corporation" to general jurisdiction. *Id.* (emphasis added). It did not hold that use of a subsidiary may *never* subject a parent corporation to general jurisdiction in a forum state, much less establish that principle as a matter of constitutional law.[10]

2. It would be surprising if the alter ego test – a creature of state law developed for a very different purpose – by happenstance also dictated the constitutional outer limits of general jurisdiction under the Due Process Clause.

The policies underlying the alter ego test are quite different from the concerns underpinning this Court's personal jurisdiction decisions. The alter ego concept was developed in the context of corporate veil-piercing as an equitable doctrine focused on

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[10] Indeed, if anything, the Court's decision suggests that the Constitution would permit a broader rule than the one the Court adopted as a matter of federal common law. The Court noted that "Congress has not provided that a corporation of one state shall be amenable to suit in the federal court for another state in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein." *Cannon*, 267 U.S. at 366. That observation would have been entirely irrelevant if the Court believed that such a statute would have been prohibited by the Due Process Clause.

defeating fraudulent corporate activity. *See* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1:1 (2011) (PRESSER); BLUMBERG 10.02[B], at 10-6. Personal jurisdiction law, on the other hand, is rooted in the principle that corporations enjoying the benefits and protections of a state's laws must, in all fairness, also submit to its general jurisdiction. *Int'l Shoe*, 326 U.S. at 319.

3. Nor, in any event, is the alter ego test petitioner advances so firmly ingrained in the law that it provides the only constitutional means of construing the relationship between members of a corporate family. To the contrary, as one leading scholar has noted, "the law has developed a variety of doctrines supporting the attribution of the legal consequences" of a subsidiary's act to the parent. BLUMBERG § 10.01, at 10-4; *see, e.g.*, PRESSER § 3:17 (noting that courts have held that corporate parents may be liable for the copyright violations of their subsidiaries, even absent an alter ego relationship); *id.* § 3:21 (same under Comprehensive Environmental Response, Compensation, and Liability Act); *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d Cir. 2001) (applying, under the WARN Act, an "integrated enterprise test" derived from the National Labor Relations Act that "is demonstrably easier on plaintiffs than traditional veil piercing"); *Engelhardt v. S.P. Richards Co.*, 472 F.3d 1, 5 (1st Cir. 2006) (same for Family and Medical Leave Act); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1361-62 (10th Cir. 1993) (same for Title VII and Age Discrimination in Employment Act).

4. Finally, as Judge Posner has observed, a narrow alter ego approach would unfairly allow a

corporation (including a U.S. corporation) to "insulate itself from the jurisdiction of the states in which it does business by the simple expedient of separately incorporating its sales force and other operations in each state." *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 541 (7th Cir. 1998). While the Due Process Clause protects corporations from unfair and unexpected exercises of jurisdiction, it was not enacted to facilitate evasion of responsibility for unlawful conduct in fora in which the corporation otherwise takes full advantage of the state's laws and legal system.

* * * * *

In the end, restricting jurisdiction to cases that satisfy the alter ego test fails to honor either this Court's repeated admonition that the Due Process test for personal jurisdiction "cannot be simply mechanical or quantitative," *Int'l Shoe*, 326 U.S at 319, or the underlying search for fairness that the Due Process Clause demands. While Congress and the states are free to adopt the alter ego rule as a matter of legislative policy, the Constitution does not command it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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BRIEFS

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IN THE
Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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STATUTE

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REPLY BRIEF FOR PETITIONER

Respondents acknowledge that the circuits are divided over whether the Due Process Clause permits a court to exercise general personal jurisdiction over a foreign corporation based on the in-state activities of a subsidiary that is not an alter ego of the parent. Br. in Opp. 9–14. Although respondents attempt to narrow that split by misreading several decisions, they do not deny that the circuits have adopted irreconcilable answers to a jurisdictional question of fundamental importance to the international relations of the United States and the ability of both domestic and foreign corporations to structure their conduct with some assurance as to where they can be sued.

Instead, respondents invent supposed vehicle problems that either lack support in the record below or simply do not make legal or logical sense. For example, they claim that general jurisdiction over Daimler AG might be proper in Michigan, Br. in Opp. 17–18, but the district court squarely held that this argument was forfeited. Respondents also contend that this petition should be denied because this Court's forthcoming decision in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, might eliminate respondents' only remaining federal claim. Br. in Opp. 14–17. But even were that to occur, the district court would be under no obligation to dismiss respondents' foreign- and state-law claims—which respondents make clear they intend to pursue vigorously on remand—making it imperative that this Court reverse the Ninth Circuit's clearly erroneous personal-jurisdiction holding before Daimler AG is compelled to litigate further in a State in which it does not manufacture or sell products, own property, or em-

ploy workers. Moreover, the Ninth Circuit's decision has implications that extend well beyond this case, and should not remain on the books simply because Daimler AG might ultimately prevail in this litigation on non-jurisdictional grounds. In any event, respondents' request that this Court *immediately* deny the petition is incoherent on its own terms: If *Kiobel* does *not* eliminate respondents' Alien Tort Statute ("ATS") claim, there would be no conceivable reason to refrain from granting review. Even if the ATS claim were respondents' only cause of action, the proper course would be to hold this petition for *Kiobel* and then grant plenary review if *Kiobel* preserves that claim.

The expansive jurisdictional rule that has been adopted by the Second and Ninth Circuits, each home to numerous subsidiaries of foreign corporations, vitiates bedrock principles of corporate separateness and "extends the reach of general personal jurisdiction far beyond its breaking point." Pet. App. 135a (O'Scannlain, J., dissenting from denial of rehearing en banc). This Court should grant review and set forth a uniform rule that comports with due process.

ARGUMENT

I. RESPONDENTS CONCEDE THAT THERE IS A CONFLICT OF AUTHORITY AMONG THE CIRCUITS.

A. Respondents concede that the courts of appeals are divided over whether a parent corporation can be subject to general personal jurisdiction based on the in-state activities of a subsidiary that is not an alter ego of the parent. Br. in Opp. 9–14. They take issue only with the scope of the split, claiming that the Eighth Circuit alone has "directly consid-

ered and rejected" the position that a mere "agency" relationship between a foreign parent and an in-state subsidiary is sufficient to establish general jurisdiction over the parent. *Id.* at 13.

Even if the division of authority were only 3-1, as respondents contend, Br. in Opp. 11, 13, it would be intolerable to leave that split unresolved and to continue subjecting foreign companies to lawsuits in U.S. courts for conduct anywhere in the world based solely on the fact that they have a subsidiary headquartered in Los Angeles or New York rather than St. Louis. Indeed, the decision below creates entirely artificial incentives for U.S. subsidiaries to relocate to States where their foreign parents will not be subjected to such far-reaching jurisdiction.

In any event, respondents vastly understate the extent of the circuit split; as eight federal appellate judges have concluded, the decision below "is inconsistent with the law of at least six [other] circuits." Pet. App. 136a (O'Scannlain, J., dissenting from denial of rehearing en banc). With no discussion of the cases' holdings or reasoning, respondents assert that the decisions of the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits cited by Daimler AG did not hold that an alter-ego relationship was *necessary* to subject a parent to general jurisdiction based on its subsidiary's activities, leaving that question open in those circuits. Br. in Opp. 11–12. That is not correct.

For example, in *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359 (5th Cir. 1990), the Fifth Circuit expressly considered and rejected the position that the significant control exercised by the parent over its wholly-owned subsidiaries—including having them "funnel their revenues into centralized bank ac-

counts" and conduct the parent's business in Louisiana—was sufficient for general jurisdiction. *Id.* at 1363. Because the parent "observe[d] corporate formalities" and permitted its subsidiaries to run day-to-day activities and keep their own books, the alter-ego test was not satisfied, leaving "no basis" to exercise personal jurisdiction over the parent. *Id.*

Similarly, in the other cited cases, the courts made clear that the alter-ego test sets forth the due process boundary for whether a parent can be subject to general jurisdiction based on the activities of its subsidiary. *See, e.g., Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008) (answering the question of "the extent to which a parent corporation is subject to general jurisdiction based on activities of a subsidiary" by applying the alter-ego standard); *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 943 (7th Cir. 2000) (holding that "constitutional due process *requires* that personal jurisdiction cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary" (emphasis added)). Instead of confronting these decisions directly, respondents point to admitted dicta in other decisions of the First and Seventh Circuits supposedly "indicat[ing] that they are open to theories beyond the alter ego test." Br. in Opp. 12. But that dicta casts no doubt on the division of authority deepened by the actual *holdings* of those circuits.[1]

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[1] Contrary to respondents' contention, the First Circuit's decision in *Miller v. Honda Motor Co.*, 779 F.2d 769 (1st Cir. 1985), is a constitutionally-based holding that addressed "the

B. Respondents attempt to narrow the Ninth Circuit's sweeping holding by citing toothless "limitations" on the court's standard. Br. in Opp. 19–22. They claim, for example, that the Ninth Circuit's test would not encompass a subsidiary that is "truly independent." *Id.* at 20. The decision below, however, made clear that the parent need not "actually exercise control over the operations of its subsidiary" to meet the "agency" standard, but rather need only retain the "right to control" the subsidiary. Pet. App. 26a–27a. The malleable "right to control" standard would likely subject *any* parent of a majority-owned subsidiary to general jurisdiction. Indeed, the Ninth Circuit explained that there need not even be an "explicit" agreement between the parent and subsidiary but rather only "some manifestation of assent to the right to control." *Id.* at 27a n.15 (internal quotation marks omitted).

Respondents also point to the requirement that the exercise of jurisdiction be "reasonable," but the factors that the Ninth Circuit found to render the assertion of jurisdiction here reasonable—for example, that Daimler AG designs cars to meet California legal requirements—would be true of countless foreign corporations whose products are sold by subsidiaries in the United States. Other factors cited by the Ninth Circuit, such as the claim that Daimler AG "purposefully and extensively interjected itself into the California market through MBUSA," *id.* at 31a, merely beg the question whether MBUSA's separateness should be disregarded. And although one

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[Footnote continued from previous page]

outer limits of what is permitted by the due process clause." *Id.* at 770.

factor vividly illustrated the unreasonableness of exercising general jurisdiction here—that German courts have objected to it—the Ninth Circuit brusquely stated that "we do not agree" with the courts in Daimler AG's home country. *Id.* at 34a.[2]

Finally, respondents suggest that this Court should turn a blind eye to the Ninth Circuit's boundless standard for general jurisdiction because other doctrines, such as *forum non conveniens*, international comity, and what respondents call "the customary international law doctrine of the exhaustion of local remedies," will require dismissal in some cases in which general jurisdiction is asserted against a foreign company. Br. in Opp. 22–24. That argument is ironic in the extreme, given respondents' strenuous contention below that neither German nor Argentine courts are adequate alternative forums for this suit. In any event, this Court has never suggested that the existence of non-constitutional limitations on the exercise of jurisdiction—which could be overridden by legislatures or common-law courts—are relevant to the requirements imposed by due process. And as a practical matter, companies could hardly "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted), by relying on discretionary doctrines like *forum non conveniens*.

C. Respondents downplay the importance of reviewing, and reversing, the decision below on the

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[2] In *Kiobel*, Germany reiterated its objection to jurisdictional overreaching by U.S. courts and specifically pointed to the decision below. Br. of Fed. Rep. of Germany, No. 10-1491, at 10 n.3.

ground that, in *prior* decisions, "courts within the Ninth Circuit regularly dismiss[ed] suits against foreign defendants for lack of personal jurisdiction." Br. in Opp. 25. Those cases are irrelevant to the practical effects that the Ninth Circuit's "newly reformed test" will have on litigation against foreign companies. Pet. App. 139a n.2 (O'Scannlain, J., dissenting from denial of rehearing en banc).[3]

Respondents also cite three subsequent district-court decisions, but those cases cast no doubt on the breadth of the Ninth Circuit's holding. In one of the cases, for example, the court merely rejected the even more attenuated assertion of jurisdiction over a foreign *subsidiary* of a foreign company based on the contacts of the parent's American subsidiary. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 U.S. Dist. LEXIS 96739, at *12–13 (N.D. Cal. Aug. 29, 2011). And in *Bixby v. KBR, Inc.*, 2011 U.S. Dist. LEXIS 79156 (D. Or. June 16, 2011), the district court expressly acknowledged that the decision below held broadly that a parent is subject to general jurisdiction to the same extent as its subsidiary if the subsidiary "performs services that are sufficiently important to the [parent] corporation that if it did not have a representative to perform them, the [parent] corporation's own officials would undertake to perform substantially similar services, and . . . the parent has some cognizable right to control the subsidiary's operations (regardless of whether the right to control is actually exercised)." *Id.* at *17 (empha-

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[3] Although respondents claim that the decision below applied a Ninth Circuit standard developed in 1977, the dissenting judges correctly explained that the panel's test was "not . . . an accurate characterization of [the circuit's] precedent." Pet. App. 139a n.2.

s omitted; alterations in original; internal quotaon marks omitted). The court decided only that the ıbsidiary was not itself subject to general jurisdicon in Oregon. *See id.* at *16–18. Far from assuag-ıg concern over the implications of the Ninth Cirıit's holding, *Bixby* demonstrates just how expanvely it has been read by lower courts.

Respondents also assert that in the twelve years nce the Second Circuit's decision in *Wiwa v. Royal 'utch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), "on-' a handful" of cases have found general jurisdiction ver a foreign company under the "agency" theory. r. in Opp. 24. The reported decisions, however, ilıstrate the threat that the rule adopted by the Seond and Ninth Circuits poses to foreign companies, 'ho will find themselves subject to suit in the United tates based on the presence of even minor subsidiries. In *SEB S.A. v. Montgomery Ward & Co.*, 2002 VL 31175244 (S.D.N.Y. Oct. 1, 2002), for example, he district court asserted general personal jurisdicion over a foreign corporation that ran an internaional business "responsible for products under [numerous] brand names" on the ground that it owned ın American subsidiary that performed investor-elations activities on behalf of the parent in New ork. *Id.* at *3–4. Moreover, reported decisions do ıot account for the myriad costs imposed by the Se:ond and Ninth Circuits' flawed agency rule, includng the significant jurisdictional discovery that it in-ites, with attendant legal fees and settlement pres-ure, or the ways in which companies are forced to :hange how they structure their primary conduct, *Burger King*, 471 U.S. at 472, to avoid unconstitu:ional assertions of jurisdiction in New York, California, and elsewhere.

II. This Case Squarely Presents An Issue Of Surpassing Legal And Practical Significance.

With no substantial argument that this Court should decline to resolve the division of authority among lower courts, respondents resort to illusory vehicle problems. Respondents suggest, for example, that the interlocutory posture of the decision below disfavors this Court's review, Br. in Opp. 14, but nearly all of this Court's personal-jurisdiction decisions have come to this Court without a final judgment. *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). In reality, this case squarely implicates an exceptionally important jurisdictional question on which the lower courts are deeply divided.

A. Respondents argue that this case is not a proper vehicle to resolve the question presented because this Court's forthcoming decision in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, may eliminate respondents' ATS claim, their only remaining federal cause of action. Br. in Opp. 14–17. As respondents concede, however, there is no guarantee that the district court would refrain from exercising subject matter jurisdiction over their remaining foreign- and state-law claims on remand, 28 U.S.C. § 1367(c), and respondents have made clear that they fully intend to pursue those claims in the district court regardless of the outcome of *Kiobel*. Daimler AG should not be subject to further litigation in U.S. courts when it has already interposed a meritorious jurisdictional objection that is properly before this Court. Indeed, should the district court elect to exercise subject matter jurisdiction over the remaining

aims, Daimler AG may have no opportunity to chal-
nge the Ninth Circuit's erroneous personal-
risdiction holding until after a full trial on the mer-
s.

Moreover, even if the district court declines to
xercise supplemental jurisdiction, the Ninth Cir-
uit's holding has vast jurisprudential, economic, and
oreign-policy implications that transcend the parties
o this case. If Daimler AG eventually prevails on
ther grounds, that deeply flawed jurisdictional deci-
ion—which threatens to unsettle U.S. foreign rela-
ions and deter foreign companies from doing busi-
ess in the U.S. market—should not be left standing.
See Br. of *Amici Curiae* Chamber of Commerce et al.
2–18; Br. of *Amici Curiae* Alliance of Automobile
Manufacturers, Inc. et al. 17–26.

Accordingly, this Court should grant the petition
nd reverse the Ninth Circuit's decision without re-
gard to the pending *Kiobel* case. In any event, re-
spondents' request that the petition be *immediately*
lenied makes no sense. Even if respondents' ATS
claim were the only claim in the case, the proper
course would be to hold this petition until *Kiobel* is
lecided and then, depending on the outcome of *Ki-
obel*, either grant plenary review or grant, vacate,
nd remand the case to the Ninth Circuit. *Cf. U.S.
Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S.
18, 25 (1994). Respondents argue that holding the
petition for *Kiobel* is unnecessary because "the dis-
trict court will already be empowered to give effect to
Kiobel without the need for a remand from this
Court." Br. in Opp. 16. But that argument ignores
the possibility that this Court will decide *Kiobel* fa-
vorably to respondents, preserving their ATS claim.
In that circumstance, there would be no reason for
this Court not to grant plenary review.

B. Respondents assert that, were this Court to reverse the Ninth Circuit, this case would be transferred to Michigan because Daimler AG allegedly had one of two corporate headquarters there when this suit was filed. Br. in Opp. 17–18. This argument was forfeited below: When respondents attempted belatedly to argue that the case could be transferred to Michigan, the district court "reject[ed] the[] newly-raised argument[]" as waived. Pet. App. 92a.

Moreover, the record is clear that Daimler AG has never maintained its headquarters in Michigan. Respondents confuse Daimler AG, which manufactures Mercedes-Benz vehicles, with the former DaimlerChrysler Corporation ("DCC"), a Delaware corporation that manufactured Chrysler, Dodge, and Jeep vehicles and had its principal place of business in Auburn Hills, Michigan. Decl. of Louann Van Der Wiele, Dist. Ct. Dkt. 37 ¶ 3 (Apr. 18, 2005). From 1998 until the sale of DCC to a third party in 2007, the two companies were affiliated as part of the DaimlerChrysler group, with DCC an indirect subsidiary of Daimler AG. *See id.* ¶¶ 2–3. But Daimler AG was at all times a German company with its principal place of business in Stuttgart, Germany. *Id.* ¶ 2.

The quotation that respondents lift from a proxy statement, Br. in Opp. 2, refers to the DaimlerChrysler group of companies as a whole, which included both DaimlerChrysler AG and DCC, among many others. It does not suggest that Daimler AG itself maintained a headquarters in Michigan. Indeed, the quotation makes clear that DCC's headquarters were in Michigan while Daimler AG's headquarters were (and are) in Germany. Respondents' belated factual assertion thus poses no barrier to this Court's re-

iew, and rejection, of the Ninth Circuit's boundless ırisdictional ruling.

CONCLUSION

The petition for a writ of certiorari should be ;ranted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-965

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAIMLER CHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF *AMICI CURIAE*[1]

The Alliance of Automobile Manufacturers, Inc. ("the Alliance") is a nonprofit trade association of car and light truck manufacturers, whose members include BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda North American Operations, Mercedes-Benz USA, Mitsubishi North America, Porsche Cars North America, Toyota Motor North America, Inc., Volkswagen Group of America, Inc. and Volvo Car Corporation.

The Association of Global Automakers ("Global Automakers"), formerly known as the Association of International Automobile Manufacturers (AIAM), is a nonprofit trade association whose members include the U.S. manufacturing and distribution subsidiaries of 14 international motor vehicle manufacturers, including: American Honda Motor Co., Inc., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Inc., Isuzu Motors America, LLC, Kia Motors America, Inc., Mahindra & Mahindra Ltd., Maserati North

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[1] Pursuant to S. Ct. Rule 37.6, counsel of record for *amici curiae* states that no counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amici curiae* has made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for *amici curiae* gave timely notice of the intent to file this brief and all parties have consented to its filing.

America, Inc., McLaren Automotive, Ltd., Nissan North America, Inc., Peugeot Motors of America, Subaru of America, Inc. and Toyota Motor North America, Inc.

Amici's members include global companies that design, manufacture and sell vehicles in various parts of the world. The mission of the Alliance and of Global Automakers is to protect and promote the legal and policy interests of their members. As automobile manufacturing is an international business, the jurisdictional issues presented in this case are of major importance to *amici's* member companies, who are uniquely positioned to provide needed guidance to this Court.

INTRODUCTION

In this case, the Ninth Circuit Court of Appeals held that twenty-two Argentinian citizens or residents may obtain personal general jurisdiction in California over DaimlerChrysler AG, now known as Daimler AG, a German corporation, under an implied agency concept, based solely on the alleged presence in California of Mercedes-Benz USA, LLC ("MBUSA"), an indirect Daimler AG subsidiary, even though plaintiffs' claims are entirely unrelated to, and do not arise from, any contacts with California by either Daimler AG or MBUSA. The events at issue took place more than 40 years ago, halfway around the world in Argentina. None of the events giving rise to this suit occurred in California, or even the United States. None of the plaintiffs is an American citizen and there is no meaningful connection between the parties or the facts of this

case and California. One might properly ask, "What is such a case doing in the Courts of the U.S.?" Yet, the Ninth Circuit held that Daimler AG is subject to general jurisdiction in California because MBUSA is purportedly an "agent" of Daimler AG for jurisdictional purposes.

This ruling constitutes an unprecedented expansion of personal jurisdiction over foreign corporations and an erosion of the concept of separate corporate identity. It sets a dangerous precedent with profound implications not only for *amici's* members, both here and abroad, but for virtually all manufacturers abroad whose products are distributed in this country by American subsidiaries or totally independent parties. This holding, if upheld by this Court and applied by other federal and state courts, would permit American courts to exercise what amounts to universal jurisdiction over nonresident corporations "in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world." *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003) (emphasis in original).

This Court recently rejected such an expansive view of general jurisdiction as not consonant with Due Process. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, __U.S. __, 131 S. Ct. 2846, 2856, 180 L. Ed.2d 796, 809 (2011) (rejecting "sprawling view of general jurisdiction" under which "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.")

Beyond the blatant incompatibility with this Court's doctrine, and the manifest existence of a split in authority among the various Circuits with respect to purported "agency" jurisdiction, critical policy considerations militate against the essentially limitless view of general jurisdiction adopted by the Ninth Circuit. These policy considerations include: the risk of retaliation by the legislatures and courts of foreign countries against U.S. companies; the open invitation to plaintiffs' counsel to engage in forum shopping; the damage to the federal government's ability to conduct foreign relations and to negotiate treaties; and the chilling effect upon business activity and investment.

Failure by this Court to overrule the Ninth Circuit and to reaffirm and apply the traditional limitations regarding general jurisdiction will result in far-reaching and even disastrous consequences. The Ninth Circuit's reasoning in this case significantly increases the exposure of foreign businesses to lawsuits in the U.S. arising out of events and activities not even remotely related to contacts with the forum of those foreign businesses. Not only would this risk create a flight of foreign companies doing business or investing in the U.S., but U.S. federal and state courts could be deluged with litigation having no connection to the U.S. Plaintiffs' counsel would be permitted to select a favorable U.S. forum in which to litigate any claim arising worldwide, simply because the target foreign defendant has a "relationship" with a separate company located in the selected U.S. forum, although the forum has nothing to do with the claim.

Nations in the European Union and elsewhere have already demonstrated a willingness to retaliate in response to overreaching assertions of jurisdiction by U.S. courts. If the Ninth Circuit's decision is permitted to stand, U.S. companies may face reciprocal treatment abroad, with the result that U.S. corporations may be haled into foreign courts to defend claims which have nothing to do with those foreign countries, causing an unfathomable burden to U.S. corporations.

The Ninth Circuit's holding fuels uncertainty and unpredictability for manufacturers engaged in decision-making regarding how and where to do business. If the ruling is permitted to stand by this Court, the U.S. environment would no longer be one in which businesses can "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). A corporation cannot reasonably expect that it may face a lawsuit in a forum based upon the contacts with the forum of a separate corporation, for unrelated activities which are profoundly distant from the forum, both in place and in time.

Amici urge this Court to reject the Ninth Circuit's overreaching assertion of universal general jurisdiction over any company in the world which has a relationship with subsidiaries, affiliates or independent contractors in the United States. *Amici* urge this Court to adhere to its historical and longstanding limitations on the exercise of personal

jurisdiction by American courts over nonresident corporations.

FACTUAL AND PROCEDURAL BACKGROUND

Amici adopt the statements of fact set forth in Daimler AG's Petition.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Erodes the Limitations Which Due Process Places On a Court's Exercise of "General" Personal Jurisdiction.

A. The Decision Abrogates the Due Process Mandate that the Required Minimum Contacts with the Forum State Must be Assessed for Each Defendant Individually.

The Constitutional right to Due Process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-472 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Due Process requires that, for a nonresident corporate defendant to be subjected to personal jurisdiction, it must have certain minimum contacts with the forum, such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Helicopteros Nacionales de Colombia, S.A., v. Hall*, 466 U.S. 408, 414 (1984),

quoting *International Shoe*, 326 U.S. at 316. This requirement of minimum contacts ensures that the defendant has "fair warning" that its decision to engage in certain activities may subject it to a foreign court's jurisdiction. *Burger King*, 471 U.S. at 472.

"Specific jurisdiction," as opposed to "general jurisdiction," is the exercise of "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros*, 466 U.S. at 414 n.8. Here, indisputably, there is no basis for specific jurisdiction over Daimler AG, since plaintiffs' suit does not arise out of or relate to any activities or contacts by Daimler AG with California.

General jurisdiction extends to cases "not arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.9. However, this Court has instructed that the defendant's activities in the forum state must be sufficiently "continuous and systematic" as well as "substantial" to make the assertion of general jurisdiction reasonable. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-46 (1952). As *Goodyear Dunlop Tires Operations, S.A. v. Brown, supra* declares, the defendant must be "at home" in the forum for general jurisdiction to apply (131 S. Ct. at 2854, 180 L. Ed.2d at 806).

The "substantial, continuous and systematic" contacts and "at home" standard for general jurisdiction is a demanding one. It is considerably more stringent than that employed for specific jurisdiction. See *Burnham v. Superior Court of*

California, 495 U.S. 604, 610, 618 (1990) (plurality opinion); *Burger King*, 471 U.S. at 472-73 and n. 15; *Helicopteros*, 466 U.S. at 415. This much higher burden is necessitated because of the far-reaching consequences to a defendant that accompany the exercise of general jurisdiction, through which a defendant can be compelled to appear and defend an action that has nothing to do with its activities with the forum (see, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown, supra,* 131 S. Ct. at 2855-2857).

This Court has made clear that the relevant jurisdictional contacts are to be assessed for the defendant individually. See, e.g., *Burger King*, 471 U.S. at 475 ("Jurisdiction is proper...when the contacts proximately result from actions by the defendant *himself* that create a substantial connection with the forum" [emphasis in original]); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) ("Each defendant's contacts with the forum State must be assessed individually.").

That test is not satisfied here. Daimler AG did not carry on "continuous and systematic" activities in California. The happenstance that MBUSA, an indirect subsidiary of Daimler AG, may be "present" and engage in business in California is irrelevant to the general jurisdiction analysis with respect to Daimler AG. This Court held in *Helicopteros* that "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts" (466 U.S. at 417).

This Court's test for general jurisdiction focuses on two prongs: the purposeful actions of the defendant itself in the forum and the nature of the defendant's contacts with the forum, both of which the Ninth Circuit's decision disregards. The Ninth Circuit's finding of general jurisdiction over Daimler AG because of contacts which its indirect subsidiary, MBUSA, has with California, appears to be rooted in the Court's erroneous belief that MBUSA constitutes an agent of Daimler AG for any and all unrelated matters. However, it is undisputed that none of MBUSA's contacts or activities in California had anything to do with plaintiffs' suit. The Ninth Circuit's holding, which fails to meet the more stringent minimum contacts test, violates this Court's continued instruction that the requisite minimum contacts "must be met as to *each defendant* over whom a state court exercises jurisdiction" (*Rush v. Savchuk*, 444 U.S. 320, 332 [1980] [emphasis added]), and that "Each defendant's contacts with the forum State must be assessed *individually*" (*Keeton*, *supra*, 465 U.S. at 781 n. 13 [emphasis added]).

B. Among Other Fatal Defects, the Decision Impermissibly Destroys the Distinction Between Separate Corporate Entities.

The Ninth Circuit's holding further violates this Court's recognition that "respect for corporate distinctions" is a bedrock principle of law which is "deeply engrained in our economic and legal systems." *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). Pursuant to this principle, a

corporation generally will not be held liable for the acts of its subsidiaries or other affiliated corporations. *Ibid*; see also, *Janus Capital Group, Inc. v. First Derivative Traders*, __U.S.__ , 131 S. Ct. 2296, 2304, 180 L.Ed.2d 166, 177 (2011) (rejecting liability for investment advisor based on statement made by its mutual fund client, even though there was a close corporate relationship between the two, and stating that "We decline this invitation to disregard the corporate form"). The forceful reiteration of this directive in *Goodyear* does not permit the disregard with which it is treated by the Ninth Circuit.

This principle applies not only with respect to the issue of vicarious liability, but equally to the issue of personal jurisdiction. Thus, in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335-337 (1925), jurisdiction over a foreign corporation based on its subsidiary's forum contacts was squarely rejected, even though the parent dominated the subsidiary "immediately and completely." See also, *Keeton*, 465 U.S. at 781 n. 13 ("jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary. Each defendant's contacts with the forum State must be assessed individually" [citations omitted]); *Phila. & Reading Ry. v. McKibbin*, 243 U.S. 264, 268 (1917) ("Nor would the fact...that `subsidiary companies' did business within the state, warrant a finding that the defendant did business there.").

The Ninth Circuit's decision appears to state that a different standard may be applied with respect to corporate separateness when the issue of

personal jurisdiction over the parent corporation is at stake, as opposed to vicarious liability of the parent corporation for the acts of its subsidiary (644 F.3d 909). But the Ninth Circuit provides no explanation as to why, if a parent corporation cannot be held liable based on the activities of its subsidiary, it can be held subject to personal jurisdiction on the basis of these same activities.

Should there be any concern about potential misuse of the corporate form, this Court has instructed that "the corporate veil may be pierced...when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes...." *Bestfoods*, 524 U.S. at 62. Here, there is no such allegation of misuse of the corporate form. Further, there has been no suggestion, let alone any proof, that the separate corporate forms of Daimler AG and MBUSA were disregarded, or that MBUSA was a mere "alter ego" of Daimler AG.

The Ninth Circuit's decision thus runs immediately counter to, and cannot be reconciled with, this Court's recognition of the concept of separate corporate entities. The Ninth Circuit's decision, finding general jurisdiction based on the actions and contacts with the forum of an entity other than the defendant, violates this Court's repeated admonitions regarding the need for a separate due process analysis as to each defendant "individually" and the need to respect corporate distinctions. See, e.g., *Keeton*, 465 U.S. at 781 n. 13; *United States v. Bestfoods*, 524 U.S. 51, 61-62.

C. The Ninth Circuit's Assertion of General Jurisdiction on an Implied Agency Theory is in Conflict With Several Other Circuits, and Effectively Has No Limitations.

Not only is the Ninth Circuit's decision not consonant with this Court's precedent, as demonstrated *supra*, the Fourth, Fifth, Sixth, Seventh and Eighth Circuits have categorically rejected the purported "agency" theory of personal jurisdiction propounded by the Ninth Circuit (see discussion in the Petition for a Writ of Certiorari). The split in authority thus constitutes yet another reason for this Court to grant review. It further dispatches plaintiffs' argument below that the Ninth Circuit's "agency" theory of jurisdiction is "mainstream."[2]

The breathless sweep of the Ninth Circuit's decision propounding the purported "agency" theory of general jurisdiction violates Due Process as it effectively has no limitations. In its decision, the Ninth Circuit pronounced that Daimler AG was subject to general jurisdiction because "the services

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[2] As the Ninth Circuit stated in its decision (644 F.3d at 921), its "agency" test for personal jurisdiction over a foreign corporation on the basis of its subsidiary's contacts with the forum has its origins in case law from the Second Circuit. The Court first adopted the agency theory in *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 423 (9th Cir. 1977), which relied extensively on *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967), among others. However, the *Gelfand* case involved specific jurisdiction, not general jurisdiction.

that MBUSA currently performs are sufficiently important to DCAG [Daimler AG] that they would almost certainly be performed by other means if MBUSA did not exist, whether by DCAG performing those services itself or by DCAG entering into a new agreement with a new subsidiary or a non-subsidiary national distributor for the performance of those services." As Justice O'Scannlain noted in his dissent, however, this is an illusory standard because "Anything a corporation does through an independent contractor, subsidiary or distributor is presumably something that the corporation would do `by other means' if the independent contractor, subsidiary, or distributor did not exist." The Ninth Circuit majority went on to state in the decision that whether the alleged agent was a subsidiary of the principal or independently owned is "irrelevant." Said the Court, "Independent contractors may be considered representatives." The Court then stretched this extraordinary concept of MBUSA's alleged "representation" or "agency" to events which occurred more than 40 years earlier, thousands of miles away, which had nothing to do with distributing cars in the United States.

Under the Ninth Circuit's reasoning, contracting with an independent entity to distribute cars in the United States would meet the "sufficiently important test," and if Daimler AG were to replace MBUSA with an independent entity, that entity, according to the Ninth Circuit, would still be considered a representative or agent of Daimler AG, subjecting that corporation to general jurisdiction. Going much further, the Ninth Circuit's decision indicates that a foreign corporation may be subject to

general jurisdiction even where no control is exercised over the subsidiary which is acting independently, as long as the foreign corporation has an unexercised right of control. Under this approach, there would be virtually universal jurisdiction in every American court over every significant foreign or domestic manufacturer. Moreover, because the jurisdiction would be *general*, it would exist without regard to the nature of the claim. Jurisdiction would be available, not only in every state and federal court, but "in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world." *Purdue*, 338 F.3d at 787. Such an expansive exercise of general jurisdiction is not consonant with Due Process. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown, supra,* __U.S. __, 131 S. Ct. at 2856, 180 L. Ed.2d at 809.

D. The Ninth Circuit's Assertion of General Jurisdiction Based on an Implied Agency Theory Has No Foundation in the Traditional Law of Agency.

In effect, the Ninth Circuit's decision impermissibly removes any distinction between subsidiaries, independent distributors and true agents. However, "distributors," "agents" and "subsidiaries" can be very different legal entities and have differing legal relationships with a manufacturer. See 1 W.M. Garner, *Franchise and Distribution Law and Practice* §§1:11 to 1:31, at 22-36 (2010) (distinguishing among distributorships, dealerships, agency relationships and

manufacturer's representatives, among other things).

The Ninth Circuit's decision turns the traditional law of agency on its head. The Restatement (Third) of Agency §1.01 (2006) provides that

> "Agency is the fiduciary relationship that arises when one person (a `principal') manifests assent to another person (an `agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."

Here, the Distribution Agreement between Daimler AG and MBUSA specifically disavows any agency relationship on the part of MBUSA. This is the case with most distributorship agreements. See 1 W.M. Garner, *Franchise and Distribution Law and Practice* §3:6, at 90 (2010) ("The dealer or distributor agreement usually provides that the dealer is an independent contractor and that neither party is the agent of the other for any purpose."). Not only did the Distribution Agreement explicitly disavow an agency relationship, there is no evidence that Daimler AG "manifested assent" to or designated MBUSA as its agent, particularly for events which took place in a distant country over 40 years ago. Nor is there any evidence that MBUSA agreed to serve as Daimler AG's agent. Thus, the Ninth Circuit's decision in this case stands upon the thin reed of the fiction of an untenable implied agency.

What is more, the Ninth Circuit departed from its prior precedent and further vastly inflated its jurisdictional reach when it held that a foreign parent's "right to control" a domestic subsidiary is sufficient to support general jurisdiction based on agency, whether or not it ever actually exercised that right. Prior Ninth Circuit decisions held that the mere right to control another corporation is not sufficient to establish agency and that actual exercise of control is required. See, *e.g.*, *Doe v. Unocal Corp.*, 248 F.3d 915, 926; *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980).

The Ninth Circuit's abrogation of the need for actual control violates Due Process. Such absence of control contradicts the Due Process requirement for "continuous, systematic and substantial" contact by the foreign corporation with the forum state. See, *e.g.*, *Perkins*, 342 U.S. at 448 (defendant must undertake in the state "continuous and systematic supervision" of its employees' activities from within the forum state). It is only where the corporate defendant has engaged in an exceptional sort of supervision and control of corporate activities in the forum state that general jurisdiction may be asserted (*Perkins, supra*). Where such exceptional supervision and control is absent, general jurisdiction is lacking (*Helicopteros, supra.*)

Neither the District Court nor the Ninth Circuit found that Daimler AG exercised such exceptional day to day control over MBUSA or even had the right to exercise such day to day control over MBUSA. Not only does the Distribution Agreement

specifically disavow any agency, it further provides that either party may terminate the Agreement. Daimler AG sells its vehicles, manufactured in Germany, to MBUSA in Germany, where title passes to MBUSA. MBUSA can decide not to buy certain classes of vehicles, and Daimler AG has no control over the product's ultimate destination.

In effect, the Ninth Circuit's "global enterprise" theory of jurisdiction treats the foreign corporation and its subsidiaries/distributors as a single entity. Its erasure of the limitations of Due Process would provide American courts with judicial authority over every significant manufacturer's global conduct. Such an unrestrained exercise of universal jurisdiction fails the "reasonableness" test of *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), and violates "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. For these reasons and those set forth in the Petition for a Writ of Certiorari, this Court should grant review of the Ninth Circuit's decision.

II. The Ninth Circuit's Decision May Result in Undesirable International Repercussions.

A. The Decision Subjects American Corporations to the Threat of Retaliatory Assertions of Jurisdiction by Foreign Courts, and Encourages Forum Shopping.

Aggressive assertion of jurisdiction over foreign companies risks exposing American companies to retaliatory exercise of jurisdiction by foreign courts. See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), noting that expansive application of U.S. law in foreign contexts could "invite retaliatory action from other nations." Several European nations have enacted "retaliatory jurisdictional" laws, which permit the courts of those nations to assert jurisdiction over foreign corporations to the extent that the courts of the foreign corporation's nation would have asserted jurisdiction. See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987).

Applied to the Ninth Circuit's holding, these retaliatory jurisdiction laws would allow European courts to assert jurisdiction over American companies based on relationships which the American companies have with European subsidiaries or even entirely independent distributors. What is more, because the Court's decision asserts jurisdiction over foreign companies for contacts unrelated to those giving rise to the suit, assertions of jurisdiction under these retaliatory laws would be virtually without limit. Similar jurisdiction, however, would not be asserted over other members of the European Union, as European law prohibits the application of such laws to citizens of other member countries. Born, *supra*, at 15. The effect would be to penalize American companies and hinder their attempts to gain markets in other countries.

Retaliatory legislation could subject U.S. companies to lawsuits in other nations such as Belgium, Italy or China – anywhere that the U.S. company has an affiliate, subsidiary or relationship with an independent contractor. Such lawsuits abroad would not need to have any connection whatsoever to either the defendant's or the affiliate's activities in the foreign country.

The resulting prejudice would be especially profound for companies, such as the members of the Alliance and Global Automakers, which manufacture products distributed worldwide. For example, as shown by its Form 10-K Annual Report for the year ending December 31, 2010 filed with the United States Securities and Exchange Commission ("SEC"), General Motors Company ("GM") has hundreds of subsidiaries, joint ventures and affiliates located in far-flung places around the world, including Argentina, Australia, Austria, Belgium, Brazil, Chile, China, Colombia, the Democratic Republic of Congo, Ecuador, Egypt, England, Finland, France, Germany, Greece, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Malaysia, Mexico, the Netherlands, New Zealand, Nigeria, the Philippines, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Turkey, United Arab Emirates, Uruguay, Uzbekistan, Venezuela, and Vietnam. As demonstrated by its Form 10-K Annual Report for the fiscal year ending on December 31, 2011 filed with the SEC, Ford Motor Company ("Ford") has 161 "significant" non-

U.S. subsidiaries located in a similar spread throughout the globe.

If the Ninth Circuit's holding is affirmed, prompting retaliation by foreign countries, a U.S. corporation such as GM or Ford would need to be concerned about potentially having to answer for its conduct anywhere in the world, in courts of other countries with legal systems that may be unpredictable. The impact would also be particularly harsh for small businesses which lack the necessary resources to mount a legal defense in a faraway nation. In consequence, U.S. corporations undoubtedly would take steps to avoid exporting their products to certain countries, thereby adversely affecting the U.S. economy.

Moreover, the Ninth Circuit's decision, if uncorrected, would invite an explosion of forum shopping. Pursuant to the Ninth Circuit's decision, any entity located within the U.S. – any dealer, distributor or even part manufacturer, whether subsidiary or independent contractor – would provide the basis for innumerable potential plaintiffs, who are not citizens of or residents of the U.S., to bring actions against foreign defendants on causes of action which have nothing to do with any activities in the U.S. All that a potential plaintiff would need to do is to locate an entity in the U.S. that deals in the product, has a "relationship" with the defendant, and performs a function that is "important" to the defendant. Citizens of foreign countries who have claims against manufacturers domiciled in their countries, but who desire to maintain an action in the U.S. because of a more

favorable statute of limitations, or the availability of a jury trial or an American measure of damages or some other favorable U.S. law, would be encouraged to forum shop by seeking out any company in the U.S. upon whose contacts general jurisdiction in the U.S. could be sought over the defendant. The practical consequences would be to flood U.S. federal and state courts with lawsuits that have no connection to the U.S.

Necessarily, if U.S. courts entertain claims arising in foreign countries against entities which never did business in the U.S., they will inevitably need to apply foreign law. Clearly, our judiciary is not versed in the law of Argentina, which is not only a recipe for error but would also be a significant drain on judicial resources. This illustrates why the decision is not only wrong, it is ill-advised. In view of these international concerns, the Petition for a Writ of Certiorari should be granted.

B. Exercise of General Jurisdiction Over Foreign Corporations in Circumstances Such as Those Presented Here Would Undermine the United States' Foreign Trade and Foreign Affairs Interests.

This Court has called upon the lower courts "to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction," and the "Federal Government's interest in its foreign relations policies." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115. This Court has instructed that

"'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Asahi*, 480 U.S. at 115, quoting *United States v. First Nat'l Bank*, 379 U.S. 378, 404 (1965).

The expansive exercise of general jurisdiction over foreign companies by American courts frustrates the United States' continued efforts to complete treaties with other nations with respect to the enforcement of judgments and other issues. In its *amicus* brief submitted on the appeal in *Goodyear*, *supra*, the United States government observed that:

> "[F]oreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments....The conclusion of such international compacts is an important foreign policy objective of the United States...." (U.S. Br., pp. 33-34; footnote omitted).

Absent an international agreement, the courts of foreign nations are under no obligation to enforce the judgments of another nation. *Hilton v. Guyot*, 159 U.S. 113 (1895). "The cautious enforcement of U.S. judgments abroad is certainly influenced by the fact that the United States is currently not a party to any bilateral treaty or multinational convention concerning the recognition and enforcement of foreign judgments." Wolfgang Wurmnest,

"Recognition and Enforcement of U.S. Money Judgments in Germany", 23 Berkeley J. Int'l L. 175, 177 (2005).

The United States government further noted in its *amicus* brief in *Goodyear* that:

> "A State's excessive assertion of general jurisdiction potentially threatens particular harm to the United States' foreign trade and diplomatic interests...." (U.S. Br., p. 12).

For example, expansive assertions of jurisdiction over foreign corporations under the Alien Tort Statute have prompted objections from foreign governments, causing potential problems for United States' diplomatic relations and foreign commerce. See, *e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n. 21 (2004) (noting objections from government of South Africa); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 at 141, n. 42 (2d Cir. 2010) (objections from the United Kingdom and Canada). Indeed, the Ninth Circuit recognized in its decision in the instant case that "German courts have expressed some concern that this suit may impinge upon German sovereignty." (644 F.3d at 926).

The legislative history of the Torture Victims Protection Act shows that Congress did not intend to eliminate the Constitutional mandate that the defendant have sufficient minimum contacts with the U.S. forum to satisfy Due Process. Nor did it intend to embroil U.S. courts in disputes which have nothing to do with the U.S. See comments of

Senator Spector preceding Senate passage of the bill, at 138 Cong. Rec. S. 2667. See also, statement by President George Bush, upon signing the bill, urging U.S. courts to avoid the danger of becoming embroiled in difficult and sensitive disputes in other countries and possibly ill-founded or politically motivated suits, which have nothing to do with the United States and waste already overburdened judicial resources. Signing Statement P.L. 102-256, March 16, 1992.

As the United States "must speak with one voice when regulating commercial relations with foreign governments" (*Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 [1976]), this Court should grant the Petition for a Writ of Certiorari.

C. If Not Corrected, the Ninth Circuit's Decision Would Make it Virtually Impossible for Manufacturers Abroad to Predict Where They Will Be Subject To Suit, and To Structure Their Affairs Accordingly.

Due Process jurisdictional limitations provide "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, *supra*, 444 U.S. at 297. It is only when the corporation has clear notice that it is subject to suit in a given forum that it can organize its affairs so as to "alleviate the risk of burdensome litigation by

procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State." *Ibid.*

Here, Daimler AG had no way to foresee that the alleged California contacts of an indirect subsidiary, MBUSA, could subject it to liability for activities purportedly engaged in by another indirect subsidiary in Argentina in 1970, and that as a result of MBUSA's contacts with California, Daimler AG may now potentially be sued in California for occurrences in the 1970s in Argentina, as well as all of its conduct and the conduct of all of its subsidiaries and affiliates worldwide.

Under the Ninth Circuit's decision, there is almost nothing an international-class manufacturer can do to minimize the risk of litigation in the forum. Designing a safer automobile or purchasing insurance in California would have absolutely no effect where the foreign manufacturer is being sued, for example, for the alleged renegade activities of an indirect subsidiary in South America, as is the case with Daimler AG here. The only way that such a manufacturer might potentially avoid suit in California would be to avoid the state entirely, closing any subsidiaries in the state and avoiding relationships with distributors in the state, which would have an obvious adverse impact upon the U.S. economy.

Companies such as *amici's* members, whose products are sold worldwide, utilize a wide variety of business structures and arrangements. This Court's decision permitting jurisdiction over a nonresident

manufacturer, where it utilizes a completely independent distributor or an independently operating conventional corporate subsidiary in the forum state, causes legitimate concern to *amici's* members. It affects long-existing structures, as well as prospective distributorship agreements with independent and subsidiary entities in the U.S. Its dampening effect on investment in the U.S. provides yet another reason for this Court to grant the Petition for a Writ of Certiorari.

CONCLUSION

The Ninth Circuit's explosive expansion of general jurisdiction, utilizing the fiction of "implied agency" to justify general jurisdiction over Daimler AG based on the forum contacts of a separate and independent indirect subsidiary MBUSA, contradicts this Court's precedent, flouts traditional American jurisdictional and agency principles, and violates fundamental requirements of Due Process. Unless corrected, the Court's decision will have profoundly negative implications not only for foreign companies with affiliates, subsidiaries or independent contractors in the U.S., but also for U.S. companies who export their products abroad, if retaliatory legislation is enacted. For the foregoing reasons and those set forth in the Petition for a Writ of Certiorari, the Petition should be granted.

Dated: March 7, 2012

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,
Petitioner,

v.

BARBARA BAUMAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, AND THE FEDERATION OF GERMAN INDUSTRIES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Does it violate due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state?

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IN THE

Supreme Court of the United States

No. 11-965

DAIMLERCHRYSLER AG,
Petitioner,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, AND THE FEDERATION OF GERMAN INDUSTRIES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

Amici Curiae, the Chamber of Commerce of the United States of America ("Chamber"), the National Foreign Trade Council ("NFTC") and the Federation of German Industries (*Bundesverband der Deutschen Industrie* or "BDI") respectfully submit this brief in support of the petition for a writ of *certiorari*.[1]

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici*, their counsel or their members made any monetary contribution toward preparation or submission of this brief. Letters indicating the parties'

INTEREST OF *AMICI CURIAE*

Amici Curiae are business associations representing companies doing business across state lines and international boundaries:

- The Chamber is the world's largest business federation. It represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of national concern to the business community.
- The NFTC is the premier business organization advocating a rules-based economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies. It represents its members' interests before all branches of Government, including this Court.
- The BDI serves as the umbrella organization for associations of industrial business and industry-related service providers in Germany and speaks for more than 100,000

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consent to the filing of this brief have been submitted to the Clerk. Counsel of record provided the required notice to the parties more than ten days before the filing deadline for this brief.

enterprises in Germany. It represents businesses that employ millions of people worldwide and has regularly sought to vindicate their interests in the courts of the United States.

Amici and their members have a keen interest in the law governing the jurisdiction of the United States courts, including the rules governing the imputation of jurisdictional contacts. Those rules directly affect *amici*'s members in several ways. As in this case, they may serve as the basis for asserting jurisdiction over the foreign parent – direct or indirect – of a United States subsidiary. Those same rules can be used by courts in one state to assert jurisdiction over a small business located in another state. They may permit jurisdiction over companies entering into distribution relationships, agency relationships, joint ventures, franchises or other forms through which different companies cooperate. Finally, those rules play a critical role on the international stage, affecting the enforceability of judgments rendered by United States courts, the extent to which foreign courts will assert jurisdiction over United States companies, and the prospects for greater legal harmonization between the United States and its important trading partners. *Amici* file this brief to vindicate these important interests.

INTRODUCTION

For more than a century, the Due Process Clause has served as an essential bulwark against assertions of personal jurisdiction over out-of-state defendants. *See Goodyear v. Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1878). Since this Court's decision in

International Shoe, the Clause has fulfilled this objective through the two-fold requirement that (1) the defendant have the necessary "contacts" with the forum state and (2) any exercise of jurisdiction comport with traditional notions of fair play and substantial justice. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Court has consistently applied these requirements to cases involving all types of defendants, whether individual or corporate and whether foreign or domestic. *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Hanson v. Denckla*, 357 U.S. 235 (1958).

Central to this constitutional framework is the command that these requirements "must be met as to *each* defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (emphasis added). Expounding on this principle in the corporate context, this Court has explained that "each [corporation's] contacts with the forum State must be assessed individually." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984). In cases where, as here, all parties admit that the out-of-state defendant's own contacts are constitutionally insufficient, *see* Pet. App. 20a, jurisdiction can be proper only if the Constitution permits imputation of another entity's contacts with the forum state to that defendant.

In *Cannon Manufacturing Company v. Cudahy Packing Company*, this Court considered whether a North Carolina court could exercise jurisdiction over a Maine corporation based upon service of the in-state agent of an Alabama corporation that was wholly owned by the Maine-based defendant. 267

U.S. 333 (1925). Such service, in the Court's view, was insufficient to establish personal jurisdiction over the Maine defendant. Acknowledging the commercial and financial control exercised by the Maine defendant over its Alabama subsidiary, the Court nonetheless concluded that the two entities were "distinct" and that the corporate separateness "though perhaps merely formal" was "real."

In *United States v. Scophony Corporation of America*, the Court considered whether the Clayton Act authorized jurisdiction over a foreign defendant based on its relationship with its subsidiaries. 333 U.S. 795 (1948). The Court stressed that it was "deal[ing] here with a problem of statutory construction, not one of constitutional import." *Id.* at 804. The Court interpreted the Clayton Act to permit jurisdiction and emphasized the "complex working arrangements ... with [American subsidiaries that required] constant supervision and intervention beyond the normal exercise of shareholders' rights by the [foreign parent]." *Id.* at 816. The Court only made passing reference to *Cannon*'s constitutional holding. *Id.* at 813 n. 23.

Since *Cannon* and *Scophony*, this Court has not squarely addressed the propriety of – or standards governing – establishing personal jurisdiction by imputing one entity's contacts to another entity. *See Keeton*, 465 U.S. at 781 n. 13 ("[N]or does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary."); *Rush*, 444 U.S. at 332 (declining to impute insurance company's contacts to insured). These sixty plus years of silence have spawned a variety of approaches in the lower courts. As to the controlling precedent, some lower courts follow *Canon*, others extend *Scophony*,

and yet others refuse to decide whether this Court has supplied a governing rule. *See* Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 178-80, 190-91 (5th ed. 2011) (discussing the competing approaches). Precedent aside, some courts such as the one below have suggested that two independent theories – labeled *alter ego* and agency – can support jurisdiction over parent corporations even though, as several other courts have recognized, neither *Cannon* nor *Scophony* offers any support for this binary approach. *See* Pet. 10-19. Even among those courts endorsing both theories, they disagree over the relevant standards, the applicable law and whether both theories are available in the parent-subsidiary context. *See id.* The result has been utter pandemonium in the case law.

This case offers an extreme example of the havoc wrought by this confusion in the case law. The Ninth Circuit has permitted plaintiffs to assert *general* jurisdiction over a foreign parent company based on the contacts of its indirectly held subsidiary and then try to hold that foreign parent accountable in United States court for the alleged conduct of an entirely different subsidiary that took place in a foreign country. The petition ably demonstrates why this case presents an especially good vehicle for resolving the above-described confusion among the lower courts. *See* Pet. at 10-20. *Amici* endorse those arguments but do not repeat them here. Instead, in this brief, *amici* explain why petition should be granted in light of the important issues presented by this case.

REASONS FOR GRANTING THE PETITION

Beyond the conflicts among the lower courts identified by Petitioner, *certiorari* should be granted for three additional reasons.

First, the imputation of jurisdictional contacts presents an important issue to the business community, both here and abroad. Businesses need clear and predictable jurisdictional rules. Such rules enable companies to manage risks, control liabilities and raise capital. Unclear and diluted standards for the imputation of jurisdictional contacts – whether in a parent/subsidiary relationship, manufacturer/distributor relationship or some other arrangement – deprive companies of that much-needed clarity and chill economic investment. These effects are especially harsh in cases such as this one where the imputation of contacts to support general jurisdiction potentially permits a company to be sued for conduct taking place anywhere around the world, even where that conduct is committed by a separate business entity.

Second, the imputation of jurisdictional contacts affects the commercial and foreign relations interests of the United States. Sweeping assertions of jurisdiction such as those countenanced by Judge Reinhardt's panel opinion discourage foreign direct investment in the United States. They also place the United States at odds with the rest of the world. Such conflicts invite retaliatory assertions of jurisdiction and frustrate any efforts at achieving international consensus toward a jurisdiction and judgments convention.

Third, certiorari should be granted to resolve conflicts exacerbated by Judge Reinhardt's panel opinion

about when an exercise of personal jurisdiction "comports with traditional notions of fair play and substantial justice." The panel's emphasis on "the existence of an alternative forum" conflicts with this Court's pronouncements (consistently heeded by other circuits) and erroneously collapses a constitutional inquiry about personal jurisdiction into a non-constitutional one about *forum non conveniens*. Moreover, the panel's treatment of the sovereign interests likewise cannot be reconciled with this Court's decisions. The panel's opinion grossly exaggerates California's interest in hearing a case between entirely foreign parties concerning conduct on foreign soil and inexcusably discounts Germany's interest in ensuring that its companies are not unfairly dragged into foreign forums for claims having nothing to do with their contacts with those forums.

I. Murky Standards Governing The Imputation Of Jurisdictional Contacts Discourage Commercial Activity.

The issues in this case lie at the intersection of civil procedure and corporate law. In both areas, businesses need clear and predictable rules. "Predictability," this Court recently explained in a unanimous opinion, "is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010). In the context of jurisdiction, clear and predictable rules enable parties "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Woodson*, 444 U.S. at 297. In the context of corporate law, clear and predictable rules about the separate juridical status of different business entities enable those entities to manage their liabilities, predict risks, raise

capital and enter into mutually beneficial business relationships. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998); *Anderson v. Abbott*, 321 U.S. 349 (1944); *United Elec. Radio & Machine Workers of Amer. v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1093 (1st Cir. 1992) (Selya, J., joined by Breyer, C.J., and Cyr, J.). *See generally* Phillip I. Blumberg, *The Law of Corporate Groups*: Procedural Problems in the Law of Parent and Subsidiary Corporations §1.01.1 (1983). By contrast, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz*, 130 S. Ct. at 1193.

The decision below represents an especially egregious example of a "complex jurisdictional test." Judge Reinhardt's panel opinion trains on Daimler AG's alleged "right to control" the indirectly held subsidiary that functioned as its distributor. Pet. App. 25a-29a.[2] To support its conclusion that Daimler AG exercises this "right to control," it relies principally on the distribution agreement between the two companies. Yet Judge Reinhardt's panel opinion fails to explain what features of a given distribution agreement will subject any out-of-state manufacturer to general jurisdiction in its distributor's courts. Indeed, Judge Reinhardt's panel opinion expressly disavows any attempt to articulate a bright-line test, favoring instead a murky "case-by-case common law method for refining" the test in the future. Pet. App. 23a n. 12.

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[2] *Amici* use the term "Judge Reinhardt's panel opinion" to differentiate it from the initial panel opinion that correctly held the Constitution did not permit the exercise of personal jurisdiction.

This foggy standard set by the panel opinion threatens an important instrument of international and interstate exchange. Distribution agreements are a routine part of international business transactions. *See, e.g., Rasmussen v. General Motors Corp.*, 803 N.W.2d 623 (Wis. 2011); *Estate of Thompson v. Toyota Motor Corp. Worldwide*, 535 F.3d 357 (6th Cir. 2008); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998); *Miller v. Honda Motor Co.*, 779 F.2d 769, 772 (1st Cir. 1985). In such relationships, as in this case, both title and risk pass from the manufacturer to the downstream distributor. *See* Pet. App. 49a (noting that Daimler AG "sells its vehicles ... to MBUSA in Germany, where title passes" to MBUSA). The distributor then passes the good on to either further regional distributors or end-use customers. The entire point of such an arrangement is to enable all parties to manage their risks and potential liabilities. The "case-by-case common law method" utilized in Judge Reinhardt's panel opinion throws the predictability of those risk-allocation relationships into doubt by subjecting manufacturers to the threat of general jurisdiction wherever they maintain distribution relationships.

The impact is not limited to distributorships. Courts may impute jurisdictional contacts in a variety of business relationships. *See, e.g., Stripling v. Jordan Production Co.*, 234 F.3d 863 (5th Cir. 2000) (upholding jurisdiction over out-of-state defendant based on its intent to purchase stake in another defendant's business venture); *Richard Knorr Intern. Ltd. v. Geostar, Inc.*, 2010 WL 1325641 (N.D. Ill. 2010) (upholding personal jurisdiction over out-of-state defendant based on activities of its independent contractor); *Murphy v. Cuomo*, 913 F. Supp. 671 (N.D.N.Y. 1996) (upholding jurisdiction over out-of-state defendant

based on its relationship with separate company that marketed its products). Until this Court clarifies the law in this area, these decisions leave companies in a haze about what commercial relationships, whether with a subsidiary, distributor or other business partner, will result in the imputation of one entity's jurisdictional contacts to another entity.

Nor is the impact limited to international business relationships. Putting to one side the facts of the case, at bottom Judge Reinhardt's panel opinion held that the contacts of a corporation may be imputed to its indirect owner on the basis of the importance of the company's activities and the shareholder's right to control the company's operations. Nothing in Judge Reinhardt's panel opinion confines its holding to the foreign parent/domestic subsidiary context, and courts have relied upon theories of jurisdiction by imputation in purely domestic settings as well. *See, e.g., Alderson v. Southern Co.*, 747 N.E.2d 926, 944 (Ill. App. Ct. 2001) (relying on agency principles to pierce from local power plant through four layers of ownership to domestic, out-of-state defendant); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967) (exercising personal jurisdiction over affiliated Nevada and California businesses based on use of an independent contractor in New York).

This extension of general personal jurisdiction can be especially devastating for small businesses. Small businesses represent the lifeblood of the United States economy. U.S. Small Business Administration, Office of Advocacy, The Small Business Economy: A Report to the President (2009). "Small businesses create most of the nation's new jobs, employ about half of the nation's private sector work force, and provide half of the nation's nonfarm, private real

gross domestic product (GDP), as well as a significant share of innovations." *Id.* at 1. The lax standard announced in Judge Reinhardt's panel opinion could equally be applied to assert jurisdiction over small businesses based on the contacts of their distributors or agents. Alternatively, it could be used to assert jurisdiction over their individual owners who obviously exert a great deal of "control" over the business. Several federal courts have done just that – considering, and in some cases relying upon, theories of jurisdictional imputation in cases against individual owners of such small businesses. *See, e.g., Davis v. Metro Productions, Inc.*, 885 F.2d 515, 523-24 (9th Cir. 1989); *Genetic Implant Sys., Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1459-60 (Fed. Cir. 1997); *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 652-54 (5th Cir. 2002). Unless promptly corrected, the expansive assertion of judicial jurisdiction represented by Judge Reinhardt's panel opinion could exacerbate this trend and force small business owners to choose between abandoning a potentially lucrative market or risk subjecting themselves to assertions of judicial jurisdiction in other states.

II. The Imputation Of Contacts To Support General Jurisdiction Over Foreign Corporations Discourages Foreign Investment In The United States And Undermines United States Foreign Relations.

Just recently, the Solicitor General explained how exotic theories of general jurisdiction over foreign defendants can interfere with the foreign commercial and diplomatic relations of the United States. Assertions of general jurisdiction "may dissuade foreign companies from doing business in the United States thereby depriving United States consumers of the full

benefits of foreign trade." Brief for the United States as *Amicus Curiae* Supporting Petitioners in Goodyear Dunlop Tire Operations, S.A. v. Brown, No. 10-76, at 12. Such assertions also have prompted "foreign governments' objections" and "impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Id.* The watered-down standards articulated by Judge Reinhardt's panel opinion revive the very dangers against which the Solicitor General warned.

A. Foreign Investment

Foreign direct investment plays a vital role in the health of the United States economy. *See* U.S. Dep't of Commerce, The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty 2 (2008) ("Litigation Environment"). Such investment, as President Obama recently explained, "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity, and support[s] American communities." Statement by the President on United States Commitment to Open Investment Policy (June 20, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy. The litigation environment critically influences a foreign company's decision to invest in the United States. Litigation Environment at 7. Allowing personal jurisdiction on the basis of a subsidiary's contacts enhances the costs of the United States litigation environment and encourages foreign companies to invest their capital elsewhere.

The disincentive on foreign direct investment is especially pernicious where a court, like the one below, has determined that a foreign defendant is

subject to *general* jurisdiction based on its relationship with a subsidiary or distributor. Under the logic of Judge Reinhardt's panel opinion, any party anywhere in the world could conceivably attempt to assert jurisdiction over Daimler AG (or any other foreign corporation similarly organized) based on claims that have absolutely nothing to do with the United States or California. Regrettably, this is not an isolated instance. Several foreign companies now labor under findings of general jurisdiction based not on their own contacts but, instead, on their alleged relationship with some domestic business partner. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (upholding general personal jurisdiction over foreign corporation based on activities of separate New York Investor Relations Office); *King County v. IKB Deutsche Industriebank AG*, 712 F. Supp. 2d 104 (S.D.N.Y. 2010) (upholding general personal jurisdiction over German bank based on relationship with its wholly owned New York subsidiary); *In re Chocolate Confectionary Antitrust Litig.*, 641 F. Supp. 2d 367 (M.D. Pa. 2009) (upholding general personal jurisdiction over British companies based on contacts of domestic subsidiary); *Synopsis, Inc. v. Ricoh Co.*, 343 F. Supp. 2d 883 (N.D. Cal. 2003) (upholding general jurisdiction over Japanese company based on in-forum activities of its sales and marketing units); *Japax, Inc. v. Sodick*, 542 N.E.2d 792 (Ill. App. Ct. 1989) (same); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F. Supp. 2d 376 (S.D.N.Y. 2002) (upholding general jurisdiction over German company based on its relationship with its wholly owned domestic subsidiary); *Newport Components, Inc. v. NEC Home Electronics, Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1987) (finding *prima facie* evidence to support general jurisdiction over Japanese

corporation based on its relationship with California subsidiary).

Theories of imputation are not limited to the assertions of jurisdiction by the state where the subsidiary or agent is incorporated. Other states, where the agent or subsidiary does business, may assert jurisdiction over the foreign principal or parent through theories of imputation. *See, e.g., In re Phenylpropanolamine (PPA) Products Liability Litig.*, 344 F. Supp. 2d 686 (W.D. Wash. 2003) (upholding personal jurisdiction under Oregon law over Swiss corporation based on the conduct of its Delaware subsidiary headquartered in New Jersey); *Gantzert v. Holz-Her U.S., Inc.*, 1994 WL 532134 (N.D. Ill. 1994) (upholding personal jurisdiction in Illinois over a German corporation based on the conduct of its North Carolina subsidiary); *Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. 1412 (E.D. Wisc. 1983) (upholding personal jurisdiction in Wisconsin over Japanese company based on the conduct of its California subsidiary); *Cascade Steel Rolling Mills Inc. v. Itoh & Co., Inc.*, 499 F. Supp. 829 (D. Or. 1980) (upholding personal jurisdiction in Oregon over Japanese company based on conduct of its New York subsidiary). Thus, not only are foreign corporations at risk of personal jurisdiction in the "home" of their subsidiaries, they ultimately might be answerable in any state where their subsidiaries do business. These potentially boundless extensions of jurisdiction by imputation further threaten to chill foreign direct investment in the United States.

B. Foreign Relations

The United States largely stands alone in permitting theories of jurisdiction by imputation. *See* Brian Pearce, Note, *The Comity Doctrine as a Barrier to*

Judicial Jurisdiction: A U.S.-E.U. Comparison, 30 Stan. J. Int'l L. 525, 534 (1994). The aggressive expansion of those theories, exemplified by Judge Reinhardt's panel opinion, consequently places the United States further at odds with the views of other nations, including its important trading partners. Unless corrected, these views invite retaliation by foreign nations and frustrate important efforts at harmonization in the area of jurisdiction and judgment enforcement.

As the judges dissenting from rehearing *en banc* correctly recognized, sweeping notions of jurisdiction by imputation threaten United States companies with retaliatory assertions of judicial jurisdiction by foreign courts. Pet. App. 144a. In most foreign countries, the notion of jurisdiction by imputation would be unfathomable. *See, e.g.*, European Council Regulation 44/2001; Jose Engracia Antunes, Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law 240-41 (1994). Despite the unfamiliarity of the principle, several countries have enacted "retaliatory jurisdictional laws." Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987). Under these retaliatory laws, the courts of these countries may exercise jurisdiction over foreign persons "in circumstances where the courts of the foreigner's home state would have asserted jurisdiction." *Id.* Applied to the rule announced by Judge Reinhardt's panel opinion, these laws would allow foreign courts to assert jurisdiction over United States companies – and only United States companies – based simply on the availability of jurisdiction over their subsidiaries or other agents. Moreover, because Judge Reinhardt's panel opinion permits jurisdiction over claims completely unrelated

to a party's relationship with the forum, such punitive assertions of judicial jurisdictions by foreign courts would be virtually boundless. Such an outcome would undermine the export of United States products and undercut the foreign commercial interests of the United States.

Such risks of retaliatory jurisdiction are more than hypothetical. Other nations, including close trading partners of the United States, have engaged in similar retaliation in response to aggressive assertions of prescriptive jurisdiction (such as in the antitrust context). Perhaps most famously, the United Kingdom enacted clawback statutes entitling United Kingdom citizens to recover damages equivalent to the amounts recovered by plaintiffs in suits before United States courts. *See* Born & Rutledge, *International Civil Litigation in United States Courts* at 679-83. Similarly, in the discovery context, nations such as France have enacted statutes that punish compliance with discovery orders of United States courts. *Id.* at 969-73. Unless corrected, aggressive assertions of jurisdiction by imputation invite similar retaliation in the context of judicial jurisdiction.

Not only do theories of jurisdiction by imputation invite retaliation, they also frustrate more general efforts to achieve any harmonization between the United States and its trading partners in this area of the law. The United States presently is not a party to any bilateral or multilateral convention governing jurisdiction or judgment enforcement. *Id.* at 1081-85. Though diplomats spent the better part of the last decade attempting to achieve some degree of consensus, lack of agreement on common principles of jurisdiction presented a central stumbling block. *See* Brief for the United States as *Amicus Curiae* Sup-

porting Petitioners in *Goodyear Dunlop Tire Operations, S.A. v. Brown*, No. 10-76, at 12. Sweeping theories of jurisdiction by imputation, such as that approved by Judge Reinhardt's panel opinion, do not help matters. They widen the chasm between the United States and its trading partners, further complicating any effort to achieve consensus in this area of the law. *See Asahi Metal Industry Co. v. Superior Ct. of California*, 480 U.S. 102, 115 (1987) (instructing courts to consider the "Federal interest in Government's foreign relations policies."); *Howe v. Goldcorp, Inc.*, 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.) ("The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal systems work together, in harmony, rather than at cross purposes.").

III. The Ninth Circuit's Standard For Determining Whether An Exercise Of Jurisdiction Comports With "Traditional Notions Of Fair Play And Substantial Justice" Conflicts With The Decisions Of This Court And Other Circuits.

After concluding that Daimler AG, through its subsidiary, had constitutionally sufficient minimum contacts with California, Judge Reinhardt's panel opinion assessed the reasonableness of that assertion of jurisdiction under the Due Process Clause by reference to a seven-factor "balancing" test. That test, especially as applied in Judge Reinhardt's panel opinion, conflicts both with clear Supreme Court

precedent and the views of other federal appellate courts.

Judge Reinhardt's panel opinion instructs courts to "weigh seven factors" including

> the extent of purposeful interjection; the burden on the defendant; the extent of conflict with sovereignty of the defendant's state; the forum state's interest in adjudicating the suit; the most efficient judicial resolution of the dispute; the convenience and effectiveness of relief for the plaintiffs; and the existence of an alternative forum. Pet. App. 31a.

The problem with this seven-factor test is that it contradicts this Court's commands. The critical opinion here is *Asahi*. There, this Court explained the proper test for reasonableness:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiffs' interest in obtaining relief. It must also weigh in its determination the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

480 U.S. at 113 (citation and internal quotations omitted). Consistent with this clear guidance, courts in other circuits have found that the exercise of jurisdiction over a nonresident parent based on the activities of its subsidiary would be unreasonable. *See, e.g., Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990). Judge Reinhardt's panel opinion deviates from this consistent line of precedent in two respects – (1) its

emphasis on the existence of an adequate alternative forum and (2) its weighing of the respective sovereign interests.

A. Adequate Alternative Forum

The roots of the panel's flawed approach lie in the Ninth Circuit's continued adherence to stale precedents. The seven-factor test articulated by Judge Reinhardt traces to the Ninth Circuit's 1981 decision in *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981). Tellingly, while *Marina Salina* cited supporting authority for most of the factors in its seven-factor test, it cited absolutely no authority for the proposition that the "existence of an alternative forum" was relevant to the personal jurisdiction analysis. *See Marina Salina*, 649 F.2d at 1270. That decision obviously predated this Court's decision in *Asahi*. Yet no decision of the Ninth Circuit, including those immediately after *Asahi*, appeared to consider explicitly whether *Asahi*'s formulation of the "reasonableness" test required reconsideration of the *Marina Salina* formulation. *See, e.g., Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1201 (9th Cir. 1988). While a few hew more closely to the *Asahi* formulation, *see, e.g., CARIB v. Dillon*, 976 F.2d 596, 599 (9th Cir. 1992), most decisions, such as Judge Reinhardt's panel opinion, simply parrot the *Marina Salina* formulation. As this case exemplifies, that flaw in the Ninth Circuit precedent compounds the impact of its flawed theory of jurisdiction by imputation and enhances the risk that a court will assert personal jurisdiction in a manner inconsistent with the Constitution.

The panel's emphasis on "the existence of an alternative forum" collapses two distinct inquiries – personal jurisdiction and *forum non conveniens*. *See*

Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1175 n. 5 (9th Cir. 2006) (acknowledging that the "alternative forum" factor of the Ninth Circuit's reasonableness analysis "is at the heart of the *forum non conveniens* analysis"). Personal jurisdiction is a constitutional doctrine concerned with limits on a state's sovereign power and considerations of fairness to a nonresident defendant. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). By contrast, *forum non conveniens* is a prudential doctrine of federal common law concerned with identifying the most convenient forum for resolving a dispute. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). By allowing the "existence of an alternative forum" to influence the jurisdictional inquiry, Judge Reinhardt's panel opinion allows a constitutional determination to turn on the answer to a nonconstitutional question.

This case illustrates the pitfalls of collapsing the two inquiries. Judge Reinhardt's panel opinion stresses the "conflicting expert testimony about whether equitable tolling, or an equivalent within the German legal system, would allow the suit to proceed." Pet. App. 40a. Under the *forum non conveniens* doctrine, those concerns could easily be allayed by conditioning dismissal on the defendant's waiver of any limitations defense. *See* Born & Rutledge, *International Civil Litigation in United States Courts* at 428, 449-52. By contrast, the personal jurisdiction doctrine does not permit the same degree of flexibility. Consequently, any consideration of the "availability of an alternative forum" at the jurisdictional stage of a case necessarily focuses on the most pessimistic view about the foreign forum and skews the inquiry in favor of retaining jurisdiction.

B. Interest Balancing

Apart from the Ninth Circuit's flawed grafting of *forum non conveniens* principles onto personal jurisdiction law, the panel's treatment of the respective sovereign interests in this case conflicts irreconcilably with this Court's decision in *Asahi*.

First, Judge Reinhardt's panel opinion overstates the forum state interest. In *Asahi*, this Court found that, after the plaintiff had settled his claims, California had a minimal interest in adjudicating the leftover impleader action between a Taiwanese and Japanese company. 480 U.S. at 115. Here, as the lower court acknowledged, "the events at issue did not take place in California ... [and] the plaintiffs are not California residents." Pet. App. 35a. Nonetheless, Judge Reinhardt's panel opinion found that California had "a strong interest in adjudicating and redressing international human rights abuses." Pet. App. 36a. That argument cannot survive *Asahi*. If a state lacks a constitutionally sufficient interest to adjudicate a products liability case predicated on injury to its *own* resident once that resident has settled the matter, then it can hardly have a weightier interest in resolving disputes over alleged injuries to foreign parties based on conduct that never occurred in the state.

Second, Judge Reinhardt's panel opinion understates the interests of foreign states, particularly Germany. *Asahi* highlighted the importance of foreign states' interests in cases like this one involving assertions of personal jurisdiction over foreign defendants. 480 U.S. at 115. Those interests should weigh especially heavily in a case such as this one where (unlike *Asahi*) the basis for jurisdiction bears absolutely no relationship to the alleged conduct giving rise to the

claim. Instead of treating Germany's interests with "great care," Judge Reinhardt's panel opinion gave them short shrift. While acknowledging that "German courts have expressed some concern that this case may impinge upon Germany sovereignty," Pet. App. 34a, the panel opinion promptly discounts those same concerns. The panel found that Germany's sovereignty interests "weighed less heavily" in light of the alleged benefits that Daimler AG derived from the United States market. *Id.* This analysis does not respect the balance conducted by this Court in *Asahi*. In *Asahi*, the Japanese corporation also derived benefits from the California market, yet this Court concluded that those benefits did not outweigh the "procedural and substantive interests" of Japan. Proper consideration of the *Asahi* factors, rather than the Ninth Circuit's stale pre-*Asahi* methodology, compels the same result here.

At bottom, Judge Reinhardt's panel opinion represents the culmination of a circuit precedent that has drifted too far from the standards set forth by this Court. Its confused treatment of *forum non conveniens* principles and flawed weighing of sovereign interests unfairly tilts the scales against defendants.

CONCLUSION

For the foregoing reasons, in addition to those offered by Petitioner, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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In the

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DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

NELF seeks to present its views, and the views of its supporters, on whether certiorari should be granted to decide whether the Due Process Clause of the Fourteenth Amendment, as interpreted most recently by this Court in *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851 (2011), should allow a court to exercise general personal jurisdiction over an out-of-state corporation solely because it has a corporate subsidiary conducting business on its behalf in the forum state.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), NELF also states that all parties were provided with ten-day written notice of NELF's intent to file this brief, which NELF's counsel emailed to counsel for all parties on Monday, February 27, 2012. Moreover, the parties have provided written consent to the filing of amicus briefs, copies of which NELF has included with the filing of this brief.

businesses located primarily in the New England region.

NELF has long been committed to a reasonable interpretation of federal constitutional law that affects the rights of corporations. Moreover, the Ninth Circuit's "agency" test at issue in this case is of direct importance to NELF's corporate constituents, many of whom have corporate subsidiaries or affiliates within the Ninth Circuit, and therefore could face the same fate as the Petitioner in this case and be haled unexpectedly into the courts of a distant or inconvenient forum, to defend claims that are entirely unrelated to that forum.

In this case, NELF is concerned with the Ninth Circuit's virtually limitless "agency" test, which could impose vicarious general jurisdiction on *any* foreign parent based solely on the fact that it has an in-state subsidiary that is engaged in business operations on the parent's behalf. In NELF's view, this unduly overbroad "test" offends due process because it completely ignores the bedrock principle of corporate separateness, which has long been upheld by this Court and has long informed corporations' reasonable jurisdictional expectations based on their diligent observance of corporate formalities.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to both the New

England and the national business communities.[2] This is such a case, and NELF believes that its brief would provide an additional perspective to aid this Court in deciding whether to grant certiorari to resolve the issue presented herein.

SUMMARY OF ARGUMENT

Certiorari should be granted to decide whether the Due Process Clause permits the Ninth Circuit's virtually limitless "agency" test of vicarious general personal jurisdiction, which imposes general jurisdiction on a foreign parent based solely on the fact that it has an in-state subsidiary operating on its behalf. The Ninth Circuit's unduly expansive "agency" test, both on its face and as applied in this case, offends due process. This is so because the test completely disregards the core principle of corporate separateness, long recognized by this

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[2] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

Court and legitimately relied upon by corporate actors in the structuring of their business relationships to limit their amenability to suit in remote or inconvenient jurisdictions. According to that bedrock principle of corporate law, a corporation is a separate legal entity from its owners, be they individuals or another corporation. Consequently, the conduct of one corporation is generally not attributable to another, except perhaps under limited and extreme circumstances, altogether absent in this case, showing a parent's complete disregard of the corporate form.

Thus, the in-state subsidiary's jurisdictional contacts should not generally be attributable to the foreign parent corporation. As this case illustrates, however, the Ninth Circuit's test abandons the principle of corporate separateness because it could broadly apply to virtually any parent-subsidiary relationship, even where, as here, corporate formalities have been diligently observed. The test thereby imputes general jurisdictional contacts where frequently *none* should be imputed at all. Consequently, the test falls far short of this Court's demanding, quasi-domiciliary standard for the exercise of general jurisdiction over a foreign defendant, recently announced in *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851 (2011) (requiring sufficiently "continuous and systematic" contacts with the forum state "as to

render [the foreign corporation] essentially at home in the forum State").

Contrary to the Ninth Circuit's approach, this Court, in an earlier decision, applied the principle of corporate separateness to the issue of vicarious general jurisdiction and refused to impute any of the subsidiary's forum activities to the foreign parent. *See Cannon Mfg. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). *Cannon* establishes that a court should respect the legal separateness between parent and subsidiary so long as the corporate defendant has done so. In addition to the *Cannon* decision, this Court has more recently approved the very features of a typical parent-subsidiary relationship that the Ninth Circuit has "demonized" under its overbroad "agency" test.

The Ninth Circuit's "agency" test clearly contravenes these precedents, and due process, because it almost categorically conflates the subsidiary with the parent for jurisdictional purposes, even where, as here, the parent has treated the subsidiary as a separate legal entity and should not be imputed with any of the subsidiary's jurisdictional contacts, let alone sufficiently "continuous and systematic" contacts to justify a finding of general personal jurisdiction.

The Ninth Circuit's indiscriminate test further offends due process by subverting the predictability of the judicial system, along with the corporate defendant's ability to control and

predict where it will and will not be sued. The constitutional guarantee of due process gives legal effect to the corporate defendant's reasonable expectations that, if it diligently preserves corporate formalities and structures its transactions with its subsidiary as a separate legal entity, it will not be amenable to suit in the subsidiary's forum.

Certiorari should also be granted so that the Court may resolve the apparent confusion among the lower courts on this jurisdictional issue, and to provide guidance to corporate actors, by announcing a uniform rule of imputed general jurisdiction between two otherwise legally separate entities. Consistent with this Court's precedent, such a rule should be sufficiently narrow and rigorous to preserve the principle of corporate separateness, and to satisfy this Court's recent requirement, in *Goodyear Dunlop Tires*, that the foreign corporation must have made itself "at home" in the forum state.

To overcome the principle of corporate separateness, and to satisfy the quasi-domiciliary relationship necessary under *Goodyear* for the exercise of general jurisdiction, an appropriate test should, at minimum, require a showing that the parent corporation has so completely disregarded the corporate form, such as by failing to observe corporate formalities, and by dominating and controlling the subsidiary's day-to-day

activities, that the two entities have in fact merged into one for jurisdictional purposes. No such facts are present in this case, and therefore the Ninth's Circuit's exercise of general jurisdiction over Petitioner offends due process.

I. THE NINTH CIRCUIT'S VIRTUALLY LIMITLESS "AGENCY" TEST FOR VICARIOUS GENERAL JURISDICTION VITIATES THE CORE PRINCIPLE OF CORPORATE SEPARATENESS, CONTRARY TO THIS COURT'S PRECEDENT AND THE CORPORATE DEFENDANT'S REASONABLE EXPECTATIONS.

This Court should grant Petitioner DaimlerChrysler AG's petition for certiorari and decide whether the Due Process Clause permits the Ninth Circuit's virtually limitless "agency" test for imposing vicarious general jurisdiction on a foreign parent based solely on the fact that it has an in-state subsidiary operating on its behalf.

The Ninth Circuit's unduly expansive "agency" test, both on its face and as applied in this case, offends due process. This is so because the lower court's test completely disregards the bedrock principle of corporate separateness, which has long been recognized by this Court and has legitimately informed

corporations' reasonable jurisdictional expectations based on their diligent observance of corporate formalities. According to that core principle of corporate law, a corporation is a separate legal entity from its owners, be they individuals or another corporation. "[I]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *U.S. v. Bestfoods*, 524 U.S. 51, 61 (1998).

Based on that fundamental principle of corporate law, the Court has long held that conduct of one corporation is generally not attributable to another, be it for jurisdictional or liability purposes, except perhaps under circumstances, altogether absent in this case, showing a parent's complete disregard of the corporate form. *See Cannon Mfg. v. Cudahy Packing Co.*, 267 U.S. 333 (1925) (no general jurisdiction over foreign parent based on subsidiary's forum activities, so long as corporate formalities are preserved). *See also Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-475 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. . . . The doctrine of piercing the corporate veil, however, is the rare exception, applied in the case of fraud or certain other exceptional

circumstances . . . ."); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) ("It does not of course follow from the fact that jurisdiction may be asserted over [the wholly owned subsidiary] Hustler Magazine, Inc., that jurisdiction may also be asserted over either of the other defendants [including the parent corporation]; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary. . . . *Each defendant's contacts with the forum State must be assessed individually.*") (emphasis added); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("[T]he corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact.").

Contrary to this clear precedent, however, the Ninth Circuit's test abandons the principle of corporate separateness, because it could broadly apply to virtually any parent-subsidiary relationship, even where, as here, corporate formalities have been diligently observed. In particular, the Ninth Circuit's test disregards the corporate form whenever the subsidiary's activities are "sufficiently important" to the parent such that the parent would have to carry on those activities by other

means in the subsidiary's absence. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920 (9th Cir. 2011). This is hardly a factor identifying disregard of the corporate form and is instead a flaccid and limitless formulation that merely describes the ordinary economic relationship between parent and subsidiary.

The Ninth Circuit's test further offends due process because it requires only that the parent reserve "the right to control" certain aspects of the subsidiary's operations. *See Bauman*, 644 F. 3d at 920-21, 922-23. This is also a standard feature of the parent-subsidiary relationship, and hardly one that indicates any disregard of the corporate form through *actual* control, let alone a degree of actual control sufficient to pierce the corporation veil for general jurisdictional purposes. *See Cannon Mfg. v. Cudahy Packing Co.*, 267 U.S. at 335.

In short, the Ninth Circuit's test imputes general jurisdictional contacts where frequently *none* should be imputed at all. Consequently, the test falls far short of this Court's demanding, quasi-domiciliary standard for the exercise of general jurisdiction over a foreign corporate defendant, recently announced in *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851 (2011) (requiring sufficiently "continuous and systematic" contacts with the forum state "as to render [the foreign corporation] essentially at home in the forum State"). As this Court further explained

in *Goodyear*, "[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's *domicile*; for a corporation, it is an equivalent place, one in which the corporation is *fairly regarded as at home*." *Id.*, 131 S. Ct. at 2853-54 (emphasis added).

This case clearly illustrates that the Ninth Circuit's "agency" test fails the *Goodyear* quasi-domiciliary standard because it applies overbroadly to virtually any parent-subsidiary relationship, where ordinarily none of the subsidiary's jurisdictional contacts should be imputed to the foreign parent, let alone contacts that are sufficiently "continuous and systematic."

This Court's decision in *Cannon* is on all fours with Petitioner's case and warrants closer examination. In *Cannon*, as in this case, this Court identified the issue as one of imputed jurisdiction between the in-state, wholly owned subsidiary and the foreign parent where, as here, the parent had carefully preserved the formal separateness between itself and the subsidiary. "The question is simply whether the *corporate separation carefully maintained* must be ignored in determining the existence of jurisdiction." *Cannon*, 267 U.S. at 336 (emphasis added).

As in this case, the in-state subsidiary was "the instrumentality employed to market [the foreign parent's] products within the state; but it *does not do so as defendant's agent*.

[Instead, as in this case,] [the in-state subsidiary] buys from the defendant and sells to dealers." *Cannon*, 267 U.S. at 335 (emphasis added).[3] The Court observed that the parent corporation exerted control over its wholly owned subsidiary "in substantially the same way" as it would have over its own marketing branches. *Id.* Nevertheless, the Court declined to impute the jurisdictional contacts of the subsidiary to the parent because the parent diligently preserved the separate legal identities of the two entities. Observed the Court, "[t]he corporate separation, though perhaps merely formal, was real. It was not pure fiction." *Id.* at 337.

Therefore, *Cannon*, establishes that a

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[3] While *Cannon* was apparently not decided under the Due Process Clause, and was decided before *International Shoe*, the *Cannon* decision is nevertheless consistent with *International Shoe*'s minimum-contacts analysis and, in any event, focuses on the different issue of vicarious general jurisdiction. Applying the *International Shoe-Goodyear* framework to *Cannon* clearly establishes that, as in this case, the subsidiary's forum contacts in *Cannon* were sufficient to establish general jurisdiction over it but not over its parent, even though the *Cannon* decision referred to those contacts using the older terminology of "presence" or "doing business." *Cannon*, 267 U.S. at 334-35. Therefore, *International Shoe* should not diminish the precedential value of *Cannon*'s holding, i.e., that the foreign corporation's treatment of the subsidiary as a formally separate entity should preclude imputing the subsidiary's jurisdictional contacts to the parent.

court should give full effect to the legal separateness between parent and subsidiary so long as the corporate defendant has done so. The Ninth Circuit's test and decision in this case cannot survive *Cannon*.

In addition to the *Cannon* decision, this Court has more recently approved the very features of a typical parent-subsidiary relationship that the Ninth Circuit has "demonized" under its overbroad "agency" test. Contrary to the Ninth Circuit, this Court has recognized that the typical parent-subsidiary relationship will necessarily and permissibly entail a certain degree of parental supervision and oversight, without risking judicial disregard of the corporate form. *See U.S. v. Bestfoods*, 524 U.S. at 71-72 ("Activities that involve the [subsidiary] facility but which are consistent with the parent's investor status, such as *monitoring* of the subsidiary's performance, *supervision* of the subsidiary's finance and capital budget decisions, and *articulation of general policies and procedures*, should not give rise to direct liability.") (emphasis added) (internal quotation marks omitted). *See also id.* ("Ordinarily, a corporation which chooses to facilitate the operation of its business by employment of another corporation as a subsidiary *will not be penalized* by a judicial determination of liability for the legal obligations of the subsidiary") (emphasis added).

Thus, this Court has consistently recognized that the parent corporation may exercise a reasonable degree of oversight without losing its status as a legal entity separate from its subsidiary. The Ninth Circuit's imposition of general jurisdiction in this case contravenes this clear precedent, and due process, because the lower court's decision has in effect penalized a corporation that has carefully chosen to facilitate its operations via a legally separate subsidiary, rather than through its own officers. *See Cannon*, 267 U.S. at 335. The Ninth Circuit's test is fatally overbroad because it almost categorically conflates the subsidiary with the parent for jurisdictional purposes, even where, as here, the parent has treated the subsidiary as a separate legal entity.

The Ninth Circuit's indiscriminate test further offends due process by subverting the predictability of the judicial system, along with the corporate defendant's right to structure its operations to control and predict where it will and will not be sued. As this Court has long recognized, due process gives legal effect to the corporate defendant's reasonable expectations that, if it diligently preserves corporate formalities in its business operations, it will not be amenable to suit in a distant or inconvenient forum. *See World-Wide Volkswagen Corp.*, 444 U.S. 286, 297 (1980) ("The Due Process Clause . . . gives a degree of predictability to the legal

system that allows potential defendants to *structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.*") (emphasis added). *See also id.* (due process inquiry determines whether "the defendant's conduct and connection with the forum State are such that he should *reasonably anticipate* being haled into court there.") (emphasis added).

These due process concerns for a corporate defendant's reasonable expectations, based on its carefully chosen conduct, are harmonious with an essential purpose of corporate law: to allow either corporate or individual shareholders to separate themselves formally from the commercial enterprises they own and thereby control their exposure to liability or personal jurisdiction. *See U.S. v. Bestfoods*, 524 U.S. at 61; *Cannon*, 267 U.S. at 336-37. *See also Cent. States, Southeast and Southwest Areas Pension Fund v. Reimer Express World. Corp.*, 230 F.3d 934, 944 (7th Cir. 2000) ("[T]he primary purpose of the corporate form is to prevent a company's owners, *whether they are persons or other corporations*, from being liable for the activities of the company. *Where corporate formalities have been observed, a company's owners reasonably expect* that they cannot be held liable for the faults of the company. Thus, such owners *do not reasonably anticipate being*

hailed into a foreign forum to defend against liability for the errors of the corporation.") (emphasis added); Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 32 (1986) ("Corporations are legal fictions, created for the precise purpose of allowing individuals to separate themselves from liability created by their commercial enterprises.").

In sum, certiorari should be granted to determine the constitutionality of the Ninth Circuit's virtually limitless "agency" test for vicarious general jurisdiction, which almost categorically disregards the principle of corporate separateness in the parent-subsidiary relationship, contrary to this Court's precedent and the defendant's settled expectations. The Ninth Circuit's approach is infinitely and fatally overbroad because it imputes forum contacts in many instances, such as this case, where none should be imputed whatsoever.

II. CERTIORARI SHOULD BE GRANTED TO ANNOUNCE A UNIFORM TEST FOR IMPUTED GENERAL JURISDICTION THAT IS SUFFICIENTLY RIGOROUS TO OVERCOME CORPORATE SEPARATENESS AND ESTABLISH THAT THE FOREIGN CORPORATION HAS MADE ITSELF "AT HOME" IN THE FORUM STATE.

Certiorari should also be granted to resolve the apparent confusion among the lower courts on this jurisdictional issue, and to provide guidance to corporate actors, by announcing a uniform and sufficiently rigorous test for imputing general jurisdiction between two otherwise separate corporate entities. At minimum, a proper test should require that the foreign corporate parent has disregarded the very corporate separateness that presumptively protects it from the jurisdictional contacts of its in-state subsidiary. Whether such a test should be simply coextensive with the familiar "alter ego" test for establishing inter-corporate liability under state common law is unclear. *See, e.g., Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433-34 (4th Cir. 2011) (deciding issue of imputed general jurisdiction under state "alter ego" theory of corporate liability); *Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor*

Corp. Worldwide, 545 F.3d 357, 362-63 (6th Cir. 2008) (same); *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003) (same); *Miller v. Honda Motor Co., Ltd.* 779 F.2d 769, 772 (1st Cir. 1985) (same). While the alter ego test indeed addresses relevant issues of corporate domination and control, an appropriate standard should also take into account the *unique* concerns associated with general personal jurisdiction.

It should be emphasized exactly *why* the stakes are so high when a court exercises general personal jurisdiction over a foreign corporate defendant. General jurisdiction extends to claims, such as those in this case, that have no connection whatsoever with the forum and, consequently, may be justified solely by a foreign defendant's extensive, but unrelated, contacts with the forum. The exercise of such unlimited jurisdiction therefore requires that "the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Goodyear*, 131 S. Ct. at 2853 (quoting *Int'l Shoe*, 326 U.S. at 318).

That is, the exercise of general jurisdiction can only be justified by the *special relationship* between the defendant and the forum, since the forum has no apparent relationship with the claim (in marked contrast

with specific jurisdiction, where the forum state typically has an inherent regulatory interest in the claim that arises from the defendant's in-state contacts. *See Goodyear*, 131 S. Ct. at 2851). Hence the Court's recent requirement that the foreign defendant must have made itself "essentially at home" in the forum state, i.e., must have established a quasi-domiciliary relationship with the forum, to justify the imposition of general jurisdiction. *Id.*

It is a given that an individual is subject to general jurisdiction in the state of his or her domicile, *Goodyear*, 131 S. Ct. at 2853. This is so because the individual has so completely availed him or herself of the state's protections, and has thereby generally submitted to its sovereign powers, that it is reasonable to expect the individual to defend claims in the forum state that may arise anywhere else in the world. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (discussing same). *See also* Brilmayer *et al.*, *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 731-32 (1988).

Under *Goodyear*, the foreign corporation must have established the same kind of domiciliary relationship with the forum state to justify the exercise of general jurisdiction. *Goodyear*, 131 S. Ct. at 2853-54. And yet the foreign corporation in this case, and most likely in many other parent-subsidiary relationships, lacks the sufficient "continuous and systematic"

contacts of its own with the forum state, and thus has not established the kind of relationship with the forum state that could justify the exercise of general jurisdiction.

To overcome this principle of corporate separateness, and to satisfy the quasi-domiciliary relationship necessary for the exercise of general jurisdiction, an appropriate test should require, at minimum, a showing that the parent corporation has so completely disregarded the corporate form, such as by failing to observe corporate formalities and by dominating and controlling the subsidiary's day-to-day activities, that the two entities have in fact merged into one for jurisdictional purposes. *See* Brilmayer & Paisley, *Personal Jurisdiction*, 74 Cal. L. Rev. at 29. No such facts are present in this case, and therefore the Ninth's Circuit's exercise of general jurisdiction over Petitioner offends due process.

In sum, this case provides this Court with the opportunity to announce a uniform rule for the exercise of general personal jurisdiction over a foreign parent corporation based on the jurisdictional contacts of its in-state subsidiary. Only a showing of an inextricably intertwined relationship between parent and subsidiary should be able to overcome the strong presumption of corporate separateness and establish the necessary quasi-domiciliary relationship between the foreign corporation and the forum to justify the

exercise of general jurisdiction. Such a test would also protect a foreign corporation's reasonable expectations, by establishing a clear standard by which to guide its conduct and allow it to determine whether its involvement with an in-state subsidiary could make it amenable to suit in the subsidiary's forum state for claims arising anywhere else in the world.

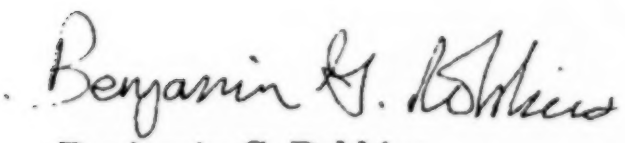
CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant Petitioner DaimlerChrysler AG's petition for a writ of certiorari.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,



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JOINT APPENDIX

Supreme Court, U.S.
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JUN 27 2013
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No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 6, 2012
CERTIORARI GRANTED APRIL 22, 2013

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General Docket
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 07-15386	**Docketed:** 03/15/2007
Nature of Suit: 3360 Other Personal Injury	**Termed:** 05/18/2011
Bauman, et al v. DaimlerChrysler Corp, et al	
Appeal From: U.S. District Court for Northern California, San Jose	
Fee Status: Paid	

Case Type Information:
1) civil
2) private
3) null

Originating Court Information
District: 0971-5 : CV-04-00194-RMW
Trial Judge: Ronald M. Whyte, Senior District Judge

Date Filed: 01/14/2004	**Date NOA Filed:**
Date Order/Judgment: 02/12/2007	03/12/2007

Prior Cases:
None

Current Cases:
None

* * *

03/15/2007	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS must be filed no later than 3/22/07; appellant's designation of RT is due 3/22/07,, ; appellee's designation of RT is due 4/2/07, ; appellant shall order transcript by 4/11/07,, ; court reporter shall file transcript in DC by 5/14/07; certificate of record shall be filed by 5/21/07 ; appellant's opening brief is due 6/28/07,, ; appellees' brief is due 7/30/07, ; appellants' reply brief is due 8/13/07,, ; [07-15386] (GR)
		* * *
08/27/2007	9	Filed original and 15 copies Appellants opening brief (Informal: NO) 61 pages & five excs of rec in 4 Vols, served on 8/24/07 (*** NOTE: brs & Vol II under seal****) Deficient: Missing Stmt of Rel Cs); notified csl minor brief deficiency response due 9/10/07; [07-15386] (MF)
		* * *

10/26/2007	15	Filed original and 15 copies appellee DaimlerChrysler AG's 60 pages brief, 2 vols. supp. EOR: ; served on 10/26/07 [07-15386] FILED UNDER SEAL PER 9/4/07 ORDER (LA)
11/15/2007	17	Filed original and 15 copies Barbara Bauman, Gregory Grieco, Josefina Nunez, Gabriele Nunez, Miriam Nunez, Silvia Nunez, Emilio Guillermo Pesce, Mirta Haydee Arenas, Graciela Gigena, Guillermo Alberto Gigena reply brief, (Informal: n) 21 pages; and 5 suppl excerpts in 1 vol; served on 11/14/07 [07-15386] FILED UNDER SEAL PER 9/4/07 ORDER (GR)
		* * *
10/21/2008	28	ARGUED AND SUBMITTED TO MARY M. SCHROEDER, DOROTHY W. NELSON and STEPHEN R. REINHARDT. (GB)

11/10/2008	29	Filed order (MARY M. SCHROEDER, DOROTHY W. NELSON and STEPHEN R. REINHARDT) On May 8, 2006, and pursuant to stipulation, the District Court ordered that certain corporate documents designated "Confidential" be subject to a protective order. Docket Entry #82. The parties are ordered to show cause as to why the General Distributor Agreement (available at Appellants' Excerpts of Record Volume II, pages 78–105) should be subject to a protective order. Responses shall be filed on or before December 1, 2008, and shall not be more than ten pages in length. (KKW)
11/28/2008	30	Filed Appellants Bauman et al., response to Order dated November 10, 2008. Served on 11/26/2008. (Panel SF) (NEW)
12/01/2008	31	Filed Appellees DaimlerChrysler AG and DaimlerChrysler Corporation response to Order to show cause regarding protective order. Served on 12/01/2008. (Panel--SF) (NEW)
05/06/2009	32	Filed order (MARY M. SCHROEDER, DOROTHY W. NELSON and STEPHEN R. REINHARDT) On November 11, 2008, we issued an order to show cause as to why the main body of

the General Distributor Agreement ("GDA") should remain under seal to which the parties have now responded. We find that the GDA should not remain under seal subject to the protective order. "A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted." Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003). "Broad allegations of harm, unsubstantiated by specific example or articulated reasoning, do not satisfy the 26(c) test." Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 472 (9th Cir. 1992) (internal quotations omitted). Defendant-appellee DaimlerChrysler AG makes no assertion that it has made reasonable efforts to keep the document confidential. Because DaimlerChrysler AG has failed to make a particularized showing that the GDA qualifies as a trade secret, see, e.g., Cal. Civ. Code § 3426.1(d), or, more generally, as a confidential document, it has failed to meet its burden. Accordingly, the GDA is no longer under seal nor is it subject to the

protective order. It is so ORDERED. (KKW)

08/28/2009 33 FILED OPINION (MARY M. SCHROEDER, DOROTHY W. NELSON and STEPHEN R. REINHARDT) AFFIRMED. Judge: DWN Authoring, Judge: SR Dissenting. FILED AND ENTERED JUDGMENT. [7043622] (RP)

* * *

05/06/2010 38 Filed Order for PUBLICATION (MARY M. SCHROEDER, DOROTHY W. NELSON and STEPHEN R. REINHARDT) Appellants' Petition for Rehearing is GRANTED. The opinion filed on August 28, 2009 is vacated. This case shall be reheard by the 3-judge panel the FILED MAY 06 2010 MOLLY C. DW YER, CLERK U.S. COURT OF APPEALS 2 week of June 21, 2010, in Pasadena, California. The date and time of oral argument will be set soon, and counsel should inform this court of any potential conflicts immediately. The parties are ordered to submit supplemental briefs addressing the following questions: 1. Is "control" an element of this court's agency test for personal jurisdiction? If so, how much control is required? If our

precedent is unclear, how much control should be required? 2. If the panel concludes that an agency relationship exists, would an exercise of general jurisdiction over defendants be reasonable in this case? These supplemental briefs shall be no longer than ten pages or 2800 words, and shall be submitted no later than 14 days after the entry of this order. Parties who are registered for Appellate ECF must file the supplemental brief electronically. Parties who are not registered Appellate ECF filers must file the original supplemental brief plus seven paper copies. The Petition for Rehearing En Banc is denied as moot without prejudice to filing a new petition for rehearing en banc. 05/20/2010 [7327745] (PH)

* * *

05/20/2010	42	Submitted (ECF) Supplemental brief for review. Submitted by Appellants Mirta Haydee Arenas, Barbara Bauman, Graciela Gigena, Guillermo Alberto Gigena, Gregory Grieco, Gabriele Nunez, Josefina Nunez, Miriam Nunez, Silvia Nunez and Emilio Guillermo Pesce. Date of service: 05/20/2010. [7345320]--[COURT UPDATE: Attached corrected version of brief. 05/21/2010 by RY] (TPC)
05/20/2010	43	Submitted (ECF) Supplemental brief for review. Submitted by Appellee DaimlerChrysler AG. Date of service: 05/20/2010. [7345351] (MJK)

* * *

06/10/2010	47	Filed clerk order (Deputy Clerk:KKW): Oral argument will now be heard on Friday, August 6, 2010, at 1:30 p.m., in Courtroom 1, of the Richard H. Chambers U.S. Court of Appeals Building, 125 South Grand Avenue, Pasadena, California. Each side will be allotted fifteen (15) minutes to present its arguments. . [7367945] (KKW)

* * *

07/09/2010	49	Filed clerk order (Deputy Clerk:KKW): Oral argument scheduled for Friday, August 6, 2010, at 1:30 p.m., in Courtroom 1, of the Richard H. Chambers U.S. Court of Appeals Building, 125 South Grand Avenue, Pasadena, California is hereby cancelled. No further oral argument is scheduled at this time. SO ORDERED. [7399398] (KKW)
05/18/2011	50	FILED OPINION (MARY M. SCHROEDER, DOROTHY W. NELSON and STEPHEN R. REINHARDT) REVERSED AND REMANDED. To the minimal extent that the opinion contains information received under seal by the district court, the seal is lifted. To the extent that any other information was received under seal, and has not previously been made public, the stipulated protective order shall remain in effect. This opinion replaces the opinion filed on August 28, 2009 and withdrawn on May 6, 2010. Judge: SR Authoring. FILED AND ENTERED JUDGMENT. [7755986] --[COURT UPDATE: Replaced PDF of Opinion (to correct submission dates.) Resent NDA. 05/18/2011 by DB] (RP)

* * *

07/01/2011	61	Filed (ECF) Appellee DaimlerChrysler AG petition for panel rehearing and petition for rehearing en banc (from 05/18/2011 opinion). Date of service: 07/01/2011. [7805231] (TO)
07/05/2011	62	Filed order (STEPHEN R. REINHARDT)Plaintiffs shall file a response to Defendants' petition for rehearing and rehearing en banc. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [7806515] (KKW)
07/08/2011	63	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Chamber of Commerce of the United States of America. Date of service: 07/08/2011. [7812736] (PBR)

* * *

07/08/2011	65	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by The Alliance of Automobile Manufacturers, Inc. and The Association of Global Automakers. Date of service: 07/08/2011. [7812777] (LMB)
		* * *
07/08/2011	69	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by THE FEDERATION OF GERMAN INDUSTRIES AND THE ASSOCIATION OF GERMAN CHAMBERS OF INDUSTRY AND COMMERCE. Date of service: 07/08/2011. [7813407] (AU)
		* * *
07/11/2011	72	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by The National Foreign Trade Council and Organization for International Investment. Date of service: 07/11/2011. [7814940] (JF)
		* * *

07/11/2011	75	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Product Liability Advisory Council, Inc.. Date of service: 07/11/2011. [7815646] (JLL)

* * *

07/26/2011	78	Filed (ECF) Appellants Mirta Haydee Arenas, Barbara Bauman, Graciela Gigena, Guillermo Alberto Gigena, Gregory Grieco, Gabriele Nunez, Josefina Nunez, Miriam Nunez, Silvia Nunez and Emilio Guillermo Pesce response to Combo PFR Panel and En Banc (ECF Filing) , for panel and en banc rehearing (statistical entry),Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing. Date of service: 07/26/2011. [7833220]. (TPC)

* * *

11/09/2011	81	Filed Order for PUBLICATION (MARY M. SCHROEDER, DOROTHY W. NELSON and STEPHEN R. REINHARDT)(Dissent by Judge O'Scannlain) The panel has voted unanimously to deny the petition for rehearing. Judge Schroeder and Judge Reinhardt have voted to deny the petition for rehearing en banc, and Judge Nelson so recommended. A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f). The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for panel or en banc rehearing will be entertained. [7959605] (RP)
11/18/2011	82	MANDATE ISSUED.(MMS, DWN and SR) [7972633] (LC)

* * *

U.S. District Court
California Northern District (San Jose)
CIVIL DOCKET FOR CASE #:
5:04-cv-00194-RMW

Bauman et al v. DaimlerChrysler Corporation
Assigned to: Hon. Ronald M. Whyte
Referred to: Hon. Richard Seeborg
Demand: $0
Case in other court: Ninth Circuit, 07-15386
Cause: 28:1331 Fed. Question: Personal Injury

Date Filed: 01/14/2004
Jury Demand: Plaintiff
Nature of Suit: 360 P.I.: Other
Jurisdiction: Federal Question

* * *

Date Filed	#	Docket Text
01/14/2004	1	COMPLAINT summos issuend and yes to jury demand against DaimlerChrysler Corporation (Filing fee $ 150.). Filed by Mirta Haydee Arenas, Jose Barreiro, Barbara Bauman, Alejandro Daer, Eduardo Estiville, Graciela Gigena, Guillermo Alberto Gigena, Nuria Gigena, Gregory Grieco, Richardo Martin Hoffman, Elba Leichner, Alfedo Manuel Martin, Juan Jose Martin, Gabriele Nunez, Josefina Nunez, Miriam Nunez, Silvia Nunez, Eduardo Olasiregui,

		Emilio Guillermo Pesce, Hector Ratto, Amelia Schiaffo, Anunciacion Spaltro De Belmonte. (lrd, COURT STAFF) (Filed on 1/21/2004) Additional attachment(s) added on 2/11/2004 (bw, COURT STAFF). (Entered: 01/21/2004)
	* * *	
02/11/2004	11	AMENDED COMPLAINT First Amended Complaint For Damages and Declaratory Relief against DaimlerChrysler AG. Filed by Barbara Bauman. (Card, Kim) (Filed on 2/11/2004) (Entered: 02/11/2004)
	* * *	
04/18/2005	36	MOTION to Quash *Service and to Dismiss for Lack of Personal Jurisdiction; Notice of Motion; Memorandum of Points and Authorities* filed by DaimlerChrysler AG. Motion Hearing set for 6/17/2005 09:30 AM in Courtroom 6, 4th Floor, San Jose. (Attachments: # 1 Exhibit Tab 1)(Kemner, Matthew) (Filed on 4/18/2005) (Entered: 04/18/2005)
	* * *	

05/16/2005	45	Memorandum in Opposition re 36 MOTION to Quash *Service and to Dismiss for Lack of Personal Jurisdiction; Notice of Motion; Memorandum of Points and Authorities in Opposition to Defendan"s Motion to Quash Service and to Dismiss for Lack of Personal Jurisdiction* filed byAll Plaintiffs. (Collingsworth, Terry) (Filed on 5/16/2005) (Entered: 05/16/2005)
* * *		
06/06/2005	60	Reply Memorandum re 36 MOTION to Quash *Service and to Dismiss for Lack of Personal Jurisdiction; Notice of Motion; Memorandum of Points and Authorities* filed byDaimlerChrysler AG. (Kemner, Matthew) (Filed on 6/6/2005) (Entered: 06/06/2005)
* * *		

06/17/2005	67	Minute Entry: Motion Hearing held on 6/17/2005 before Ronald M. Whyte (Date Filed: 6/17/2005) re 36 MOTION to Quash *Service and to Dismiss for Lack of Personal Jurisdiction; Notice of Motion; Memorandum of Points and Authorities* filed by DaimlerChrysler AG,. (Court Reporter Lee-Anne Shortridge.) (jg, Court Staff) (Date Filed: 6/17/2005) (Entered: 06/17/2005)
	* * *	
11/22/2005	72	ORDER by Judge Whyte tentatively granting 36 defendant's motion to dismiss (rmwlc2, COURT STAFF) (Filed on 11/22/2005) (Entered: 11/22/2005)
	* * *	
06/09/2006	95	REDACTED SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION to 36 Motion to Dismiss for Lack of Personal Jurisdiction, or, in the alternative, MOTION to Transfer Venue filed by Alfredo Manuel Martin, Juan Jose Martin, Jose Barreiro, Alejandro Daer, Josefina Nunez, Gabriele Nunez, Miriam Nunez, Silvia Nunez, Barbara Bauman, Emilio

		Guillermo Pesce, Mirta Haydee Arenas, Graciela Gigena, Guillermo Alberto Gigena, Nuria Gigena, Amelia Schiaffo, Elba Leichner, Anunciacion Spaltro De Belmonte, Hector Ratto, Eduardo Olasiregui, Gregory Grieco, Richardo Martin Hoffman, Eduardo Estiville. Motion Hearing set for 6/30/2006 09:00 AM. (dhm, COURT STAFF) (Filed on 6/9/2006) (Entered: 06/13/2006)
		* * *
06/09/2006	126	Supplemental Memorandum in Opposition to 36 Motion to dismiss for lack of personal jurisdiction, or, in the alternative, plaintiffs' motion to transfer venue filed byAlfredo Manuel Martin, Juan Jose Martin, Jose Barreiro, Alejandro Daer, Josefina Nunez, Gabriele Nunez, Miriam Nunez, Silvia Nunez, Barbara Bauman, Emilio Guillermo Pesce, Mirta Haydee Arenas, Graciela Gigena, Guillermo Alberto Gigena, Nuria Gigena, Amelia Schiaffo, Elba Leichner, Anunciacion Spaltro De Belmonte, Hector Ratto, Eduardo Olasiregui, Gregory Grieco, Richardo Martin Hoffman, Eduardo Estiville.

		(FILED UNDER SEAL PURSUANT TO ORDER #125 FILED 7/11/2006) (dhm, COURT STAFF) (Filed on 6/9/2006) (Entered: 07/12/2006)
06/16/2006	97	Brief / *SPECIALLY-APPEARING DEFENDANT DAIMLERCHRYSLER AG'S SUPPLEMENTAL BRIEF REGARDING MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION* filed byDaimlerChrysler AG. (Kemner, Matthew) (Filed on 6/16/2006) (Entered: 06/16/2006)
* * *		
06/16/2006	127	Supplemental Brief regarding 36 Motion to Dismiss for Lack of Personal Jurisdiction filed byDaimlerChrysler AG. (FILED UNDER SEAL PURSUANT TO ORDER # 110 POSTED 7/11/2006)(dhm, COURT STAFF) (Filed on 6/16/2006) (Entered: 07/12/2006)
* * *		

08/18/2006	128	Minute Entry: Motion Hearing held on 8/18/2006 before Ronald M. Whyte (Date Filed: 8/18/2006) re 36 MOTION to Quash *Service and to Dismiss for Lack of Personal Jurisdiction; Notice of Motion; Memorandum of Points and Authorities* filed by DaimlerChrysler AG,. (Court Reporter Irene Rodriguez.) (jg, COURT STAFF) (Date Filed: 8/18/2006) (Entered: 08/18/2006)
02/12/2007	129	ORDER Granting Defendant's Motion to Dismiss. Signed by Judge Whyte on 2/12/07. (rmwlc2, COURT STAFF) (Filed on 2/12/2007) (Entered: 02/12/2007)
02/12/2007	130	JUDGMENT in favor of Defendant against Plaintiffs. Signed by Judge Whyte on 2/12/07. (rmwlc2, COURT STAFF) (Filed on 2/12/2007) (Entered: 02/12/2007)
* * *		
03/12/2007	131	NOTICE OF APPEAL as to 130 Judgment, 129 Order by Alfredo Manuel Martin, Juan Jose Martin, Jose Barreiro, Alejandro Daer, Josefina Nunez, Gabriele Nunez, Miriam Nunez, Silvia Nunez, Barbara Bauman, Emilio Guillermo Pesce, Mirta Haydee Arenas, Graciela Gigena,

		Guillermo Alberto Gigena, Nuria Gigena, Amelia Schiaffo, Elba Leichner, Anunciacion Spaltro De Belmonte, Hector Ratto, Eduardo Olasiregui, Gregory Grieco, Richardo Martin Hoffman, Eduardo Estiville. Filing fee $ 455, receipt number 54611000618. (bw, COURT STAFF) (Filed on 3/12/2007) (Entered: 03/13/2007)
		* * *
11/21/2011	146	MOTION to Stay Proceeding filed by DaimlerChrysler AG. Motion Hearing set for 1/6/2012 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. Responses due by 12/5/2011. Replies due by 12/12/2011. (Attachments: # 1 Declaration IN SUPPORT OF DEFENDANT DAIMLER AGS MOTION TO STAY PROCEEDINGS, # 2 Exhibit A, # 3 Exhibit B, # 4 (Proposed) Order GRANTING DEFENDANT DAIMLER AGS MOTION TO STAY PROCEEDINGS)(Kemner, Matthew) (Filed on 11/21/2011) Modified on 11/22/2011 (bw, COURT STAFF). Modified on 11/29/2011 (jg, COURT STAFF). (Entered: 11/21/2011)

	* * *	
01/06/2012	150	Opposition to Motion to Stay Proceeding re 146 , 145 filed by Mirta Haydee Arenas, Jose Barreiro, Barbara Bauman, Alejandro Daer, Eduardo Estiville, Graciela Gigena, Guillermo Alberto Gigena, Nuria Gigena, Gregory Grieco, Richardo Martin Hoffman, Elba Leichner, Alfredo Manuel Martin, Juan Jose Martin, Gabriele Nunez, Josefina Nunez, Miriam Nunez, Silvia Nunez, Eduardo Olasiregui, Emilio Guillermo Pesce, Hector Ratto, Amelia Schiaffo, Anunciacion Spaltro De Belmonte. (Attachments: # 1 Affidavit of Terrence Collingsworth in support thereof, # 2 Exhibit A) (Collingsworth, Terry) (Filed on 1/6/2012) Text modified on 1/11/2012 (bw, COURT STAFF). (Entered: 01/06/2012)
01/27/2012	151	Reply in Support of Motion to Stay re 146 filed by DaimlerChrysler AG. (Kemner, Matthew) (Filed on 1/27/2012) Modified on 1/27/2012 (bw, COURT STAFF). (Entered: 01/27/2012)
	* * *	

02/17/2012	154	ORDER GRANTING MOTION TO STAY re 146 . Signed by Judge Ronald M. Whyte on February 17, 2012. (rmwlc2, COURT STAFF) (Filed on 2/17/2012) (Entered: 02/17/2012)
02/17/2012	155	Minute Entry: Motion Hearing held on 2/17/2012 before Ronald M. Whyte (Date Filed: 2/17/2012) re 146 MOTION to Stay re 145 MOTION to Shorten Time TO HEAR MOTION TO STAY PROCEEDINGS filed by DaimlerChrysler AG. (Court Reporter Summer Fisher.) (jg, COURT STAFF) (Date Filed: 2/17/2012) (Entered: 03/09/2012)
05/23/2012	156	JOINT STIPULATION TO CONTINUE STAY OF PROCEEDINGS re 154 filed by DaimlerChrysler AG. (Attachments: # 1 Declaration of Matthew J. Kemner in Support of Joint Stipulation Continuing Stay of Proceedings) (Kemner, Matthew) (Filed on 5/23/2012) Modified on 5/23/2012 (bw, COURT STAFF). (Entered: 05/23/2012)

06/14/2012	157	JOINT STIPULATION AND ORDER 156 to Continue Stay of Proceedings. Signed by Judge Ronald M. Whyte on 6/14/12. (jg, COURT STAFF) (Filed on 6/14/2012) (Entered: 06/14/2012)

* * *

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BARBARA BAUMAN, on behalf of herself and as heir of her son, OSCAR ALBERTO ALVAREZ BAUMAN; GREGORY GRIECO, on behalf of himself and as heir of his brother MIGUEL GRIECO; JOSEFINA NUNEZ, on behalf of herself and as heir of her husband, DIEGO NUNEZ; GABRIELE NUNEZ, MIRIAM NUNEZ and SILVIA NUNEZ, on behalf of themselves and as heirs of their father, DIEGO NUNEZ; EMILIO GUILLERMO PESCE, on behalf of himself and as heir of his brother, ESTEBAN A. REIMBER; MIRTA HAYDEE ARENAS, on behalf of herself and as heir of her brother , ALBERTO FRANCISCO ARENAS; GRACIELA	**Case No.: CV 04-00194 RMW** **FIRST AMENDED COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF FOR:** **1. Extra-Judicial Killing** **2. Torture** **3. Crimes Against Humanity** **4. Cruel, Inhuman and Degrading Treatment** **5. Violation of California's Wrongful Death Statute** **6. Intentional Infliction of Emotional Distress** **DEMAND FOR JURY TRIAL**

GIGENA, on behalf of)
herself and as heir of)
her husband, ALBERTO)
GIGENA; GUILLERMO)
ALBERTO GIGENA and)
NURIA GIGENA, on)
behalf of themselves and)
as heirs of their father,)
ALBERTO GIGENA;)
AMELIA SCHIAFFO,)
on behalf of herself and)
as heir of her husband)
FERNANDO OMAR)
DEL CONNTE; ELBA)
LEICHNER, on behalf of)
herself and as heir of)
her son JORGE)
LEICHNER;)
ANUNCIACION)
SPALTRO DE)
BELMONTE, on behalf)
of herself and as heir of)
her husband HECTOR)
BELMONTE; HECTOR)
RATTO; EDUARDO)
OLASIREGUI;)
RICHARDO MARTIN)
HOFFMAN; EDUARDO)
ESTIVILLE, ALFREDO)
MANUEL, MARTIN;)
JUAN JOSE MARTIN;)
JOSE BARREIRO; and)
ALEJANDRO DAER,)
)
Plaintiffs.)

vs.	)
DAMILERCHRYSLER AG and DOES 1 through 50, inclusive,	)
Defendant.	)

I. NATURE OF ACTION

1. This case involves the forced disappearance and presumed murders of Oscar Alberto Alvarez Bauman, Miguel Grieco, Diego Nuñez, Estaban A. Reimer, Alberto Francisco Arenas, Alberto Gigena, Fernando Omar del Connte, Jorge Leichner and Hector Belmonte – all workers and trade unionists at the Mercedes Benz Argentina ("MBA") plant in GonzalezCatan, Argentina. The disappearances of these individuals were carried out by state security forces acting under the direction of and in collaboration with MBA – now known as DaimlerChrysler Argentina ("DCA"), a division or wholly-owned subsidiary of the multinational corporation DaimlerChrysler Aktiengesellschaft, also known as DaimlerChrysler AG, "DCAG" or "Defendant"). Close relatives of these disappeared individuals bring this action on behalf of themselves for the injuries, including pain and suffering, they have endured as a result of these disappearances, and as heirs of the disappeared. This case also involves the kidnapping, detention and torture of Plaintiffs Hector Ratto, Eduardo Olasiregui, Ricardo Martin Hoffman, Eduardo Estivill, Alfredo Manuel Martin, Juan Jose Martin, Jose Barreiro and Alejandro Daer – workers and trade

unionists at the same MBA plant. The kidnapping, detention and torture of these Plaintiffs were carried out by state security forces acting under the direction of and with material assistance from MBA.

2. The disappearance and presumed extra-judicial killings of the aforementioned missing individuals as well as the kidnapping, detention and torture of the aforesaid Plaintiffs were committed in contravention of the law of nations, and as such, are actionable under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. §1350 and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. §1350, Note. Plaintiffs bring this action against Defendant DCAG, of which DCA, the successor-in-interest of MBA, is a division, making DCAG the responsible corporate entity for the acts of its own employees. Alternatively, DCA is a wholly-owned subsidiary that DCAG so dominates and controls that DCA is its alter ego. High-ranking employees/officials of MBA, including Director of Legal Affairs Ruben Pablo Cueva, Human Resources Director Pedro de Elias and Director of Production Juan Tasselkraut conspired with, directed and aided and abetted state security forces in carrying out the human rights violations alleged herein.

II. PARTIES

Category I Plaintiffs

3. Plaintiff Barbara Bauman is a citizen and permanent resident of Argentina. She is the mother and surviving heir of Oscar Alberto Alvarez Bauman. Oscar Alberto Alvarez Bauman had been an employee of MBA and was an independent union activist. He was disappeared along with his wife Monica on August 4, 1977. Plaintiff Barbara Bauman sues on behalf of herself for the injuries, including pain and

suffering, she has endured as a result of the loss of her son. She also brings this action on behalf of her son, as his heir, for the injuries he suffered as a result of his kidnapping, torture, disappearance and presumed murder.

4. Gregorio Grieco is a citizen and permanent resident of Argentina. He is the brother and surviving heir of Miguel Grieco. Miguel Grieco had been an employee of MBA and an independent union activist. He was disappeared by state security forces on December 14, 1976. Gregorio Grieco sues on behalf of himself for the injuries, including pain and suffering, he has endured as a result of the loss of his brother. He also brings this action on behalf of his brother, Miguel Grieco, as the latter's heir, for the injuries the latter suffered as a result of his kidnapping, torture, disappearance and presumed murder.

5. Josefina Nuñez is a citizen and permanent resident of Argentina. She is the surviving wife of Diego Nuñez, an MBA employee who was disappeared by state security forces on August 13, 1977. Josefina Nuñez sues on behalf of herself for the injuries, including pain and suffering, she has endured as a result of the loss of her husband. She also brings this action on behalf of her husband, Diego Nuñez, as the latter's heir, for the injuries the latter suffered as a result of his kidnapping, torture, disappearance and presumed murder.

6. Gabriele Nuñez, Miriam Nuñez and Silvia Nuñez are citizens and permanent residents of Argentina. They are surviving daughters of Diego Nuñez, who was disappeared on August 13, 1977. They sue on behalf of themselves, individually, for the injuries, including pain and suffering, they have endured as a result of the loss of their father. In ad-

dition, they bring this action on behalf of their father, Diego Nuñez, as the latter's heir, for the injuries he suffered as a result of his kidnapping, torture, disappearance and presumed murder.

7. Emilio Guillermo Pesce is a citizen and permanent resident of Argentina. He is the surviving brother of Esteban A. Reimer, an MBA employee who was disappeared by state security forces on January 5, 1977. He sues on behalf of himself for the injuries, including pain and suffering, that he has endured as a result of the loss of his brother. He also brings this action on behalf of his brother, Esteban A. Reimer, as the latter's heir, for the injuries he suffered as a result of his kidnapping, torture, disappearance and presumed murder.

8. Mirta Haydee Arenas is a citizen and permanent resident of Argentina. She is the surviving sister of Alberto Francisco Arenas who was disappeared by state security forces on August 19, 1977. She sues on behalf of herself for the injuries, including pain and suffering, that she has endured as a result of the loss of her brother. She also brings this action on behalf of her brother, Alberto Francisco Arenas, as the latter's heir, for the injuries he suffered as a result of his kidnapping, torture, disappearance and presumed murder.

9. Graciela Gigena is a citizen and permanent resident of Argentina. She is the surviving wife of Alberto Gigena who was disappeared by state security forces on August 13, 1977. She sues on behalf of herself for the injuries, including pain and suffering, that she has endured as a result of the loss of her husband. She also brings this action on behalf of her husband, Alberto Gigena, as the latter's heir, for the

injuries he suffered as a result of his kidnapping, torture, disappearance and presumed murder.

10. Guillermo Alberto Gigena and Nuria Gigena are citizens and permanent residents of Argentina. They are the children of Alberto Gigena who was disappeared by state security forces on August 13, 1977. They bring this case on behalf of themselves for the injuries, including pain and suffering, that they endured as result of the loss of their father. They also bring this action on behalf of Alberto Gigena, as the latter's heir, for the injuries he suffered as a result of his kidnapping, torture, disappearance and presumed murder.

11. Amelia Schiaffo is a citizen and permanent resident of Argentina. She is the surviving wife of Fernando Omar Del Connte who was disappeared on August 12, 1977. She brings this action on behalf of herself for the injuries, including pain and suffering, that she endured as a result of the loss of her husband. She also brings this case on behalf of Fernando Omar Del Connte, as the latter's heir, for the injuries he suffered as a result of his kidnapping, torture, disappearance and presumed murder.

12. Elba Leichner is a citizen of Chile and a permanent resident of Argentina. She is the mother of Jorge Leichner who was disappeared on August 14, 1977. She brings this action on behalf of herself for the injuries, including pain and suffering, that she endured as a result of the loss of her son. She also brings this case on behalf of Jorge Leichner, as the latter's heir, for the injuries he suffered as a result of his kidnapping, torture, disappearance and presumed murder.

13. Anunciacion Spaltro de Belmonte is a citizen and permanent resident of Argentina. She is the

wife of Hector Belmonte, an MBA employee and union activist who was disappeared on August 13, 1977. She brings this action on behalf of herself for the injuries, including pain and suffering, that she endured as a result of the loss of her husband. She also brings this case on behalf of Hector Belmonte, as the latter's heir, for the injuries he suffered as a result of his kidnapping, torture, disappearance and presumed murder.

Category II Plaintiffs

14. Alfredo Manuel Martin is a citizen and permanent resident of Argentina. Alfredo Martin was kidnapped, detained and tortured on December 14, 1976 by state security forces and Ruben Lavallen, a police station Chief. Alfredo Martin brings this action on behalf of himself for the damages he suffered as a result of his kidnapping, detention and torture.

15. Hector Ratto is a citizen and permanent resident of Argentina. On August 12, 1977, Hector Ratto was detained by security forces at the MBA plant in Gonzalez Catan and brought by these forces to an army barracks in Campo de Mayo and then transferred soon thereafter to a police station where he was summarily and arbitrarily imprisoned for approximately eighteen months. During his time in captivity, Hector Ratto was subject to extreme forms of torture, including electroshocking. Hector Ratto brings this case on behalf of himself for the damages he suffered as a result of his arbitrary detention and torture.

16. Juan Jose Martin is a citizen and permanent resident of Argentina. Juan Jose Martin was kidnapped in the Gonzalez-Catan factory of MBA on April 29, 1976, and brought to the police precinct in San Justo where he was detained and tortured for 19

days. Juan Jose Martin brings this case on behalf of himself for the damages he suffered as a result of his kidnapping, arbitrary detention and torture.

17. Ricardo Martin Hoffmann is a citizen and permanent resident of Argentina. Ricardo Martin Hoffman was forced to go into exile in Italy in 1977 after his house was ransacked by security forces and he discovered that these same forces were intent upon arresting him at the Gonzalez-Caton plant just as they had apprehended fellow independent unionist Alfredo Martin. Ricardo Martin Hoffman brings this case on behalf of himself for the damages he suffered as a result of his forced exile.

18. Eduardo Estivill is a citizen and permanent resident of Argentina. Eduardo Estivill was forced to go into exile in Europe in 1977 after his house was searched by police forces who were directed to his home by MBA and who were intent upon apprehending Mr. Estivill. Eduardo Estivill brings this case on behalf of himself for the damages he suffered as a result of his forced exile.

19. Jose Barreiro is a citizen and permanent resident of Argentina. Jose Barreiro went into hiding and internal exile in 1977 after his house was raided at night by police intent upon apprehending him. Jose Barreiro brings this case on behalf of himself for the damages he suffered as a result of his forced exile.

20. Alejandro Daer is a citizen and permanent resident of Argentina. In August of 1977, Mr. Daer was forced into exile in Brazil after police searched his home, detained members of his family and attempted to kidnap him. Alejandro Daer brings this case on behalf of himself for the damages he suffered as a result of his forced exile.

21. Eduardo Olasiregui is a citizen and permanent resident of Argentina. Mr. Olasiregui was wrongfully arrested and imprisoned for two and a half years as a result of the false and malicious accusations of MBA. He was later pardoned. Mr. Olasiregui brings this case on behalf of himself for the damages he suffered as a result of his wrongful and arbitrary imprisonment.

Defendant

22. Defendant DCAG is a foreign corporation with headquarters located in Stuttgart, Germany. DCAG does significant business in the United States, in the State of California, and in this District, including the importation, manufacture, marketing and sale of automobiles, as well as research for its world-wide operations, including fuel cell research. DCAG maintains one of its chief, North American offices, known as the DaimlerChrysler Research and Technology Center North America, within the jurisdiction and venue of this Court, located at 1510 Page Mill Road, Palo Alto, California 94306. DCAG also operates its world-wide e-business operations from offices in Palo Alto. DCAG, the successor-in-interest of DaimlerBenz, is the parent company of DCA (the successor-in-interest of MBA) and owns 100 percent of the latter. DCA is either a division of DCAG, or DCA is a wholly-owned subsidiary that DCAG utilizes as its mere instrumentality and so dominates and controls that DCA is its alter ego, based either on the complete lack of separateness between the two companies, or on the fact that DCA tightly controls the operations of all of its subsidiaries and is legally responsible for all of the companies within the DCAG "enterprise." Among other things, DCAG maintains domination and control over the employment prac-

tices, labor relations and human rights practices of DCA. In addition, due to DCAG's specific control over the operations of DCA, DCA is the agent of DCAG. Based on all of these relationships between DCAG and DCA, DCAG is liable for its direct role in directing or aiding and abetting the acts of DCA that resulted in harm to the Plaintiffs. Alternatively, DCAG is vicariously liable for the acts of DCA.

23. DCAG, in response to concerns raised by its own shareholders, recently investigated MBA (now known as DCA) in relation to the very allegations at the heart of the instant action and produced a detailed report of this investigation which it released publicly in December of 2003. DCAG paid the full cost of this investigation and treated the investigation as if it was an internal review of its own operations. DCAG has publicly defended the former officials of MBA alleged to have engaged in the misconduct detailed herein and has publicly treated these officials as its own officials, referring to them as "our top management" which DCAG must protect. And, while the report of this investigation concluded that these MBA officials had foreseeably placed the workers at issue in this case in mortal danger by giving their identities and addresses to repressive state forces in Argentina, and by designating these workers as "subversives" to these forces, DCAG nonetheless continues to defend the conduct of these officials and of MBA. DCAG has thereby ratified this conduct, and is liable for the conduct either because it was done by its own employees or its agents.

24. In addition, throughout the time period at issue in this case, MBA was dominated and controlled by DaimlerBenz, the predecessor-in-interest of Defendant DCAG, through such DaimlerBenz officers as Klaus Oertel. The domination and control of MBA

resulted in MBA acting as a legal or *de facto* agent for DaimlerBenz with respect to the wrongful acts alleged herein. DaimlerBenz was fully aware of the participation of the MBA officials in the human rights violations detailed in this Complaint and DaimlerBenz approved and ratified this participation at the time it took place. As a result of the above, Defendant DCAG is either directly liable for its own conduct in aiding and abetting the actions of MBA or is vicariously liable for the conduct of its agent MBA. Plaintiffs also name as Defendants Does 1-50 in the event that there are other entities not yet known, either divisions or subsidiaries of DCAG, that played a role in the wrongful acts alleged herein.

III. JURISDICTION

25. This Court has federal question jurisdiction under 28 U.S.C. §1331 and The Alien Tort Claims Act, 28 U.S.C. § 1350. The Alien Tort Claims Act ("ACTA") provides federal jurisdiction for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Plaintiffs' causes of action arise under, *inter alia*, customary international law, as expressed in the Universal Declaration of Human Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; the Charter of the Organization of American States; the American Declaration of the Rights and Duties of Man; and the American Convention on Human Rights.

26. This Court also had federal question jurisdiction under the Torture Victims Protection Act, 28 U.S.C., §1350, note. The Torture Victims Protection Act ("TVPA") expressly provides for civil liability

against any "individual," interpreted by the Ninth Circuit to include corporation, "who, under actual or apparent authority, or color of law, of any foreign nation – (1) subjects an individual to torture . . . or (2) subjects an individual to extra-judicial killing . . . ."

27. This Court has supplemental and ancillary jurisdiction over the state law claims.

28. This Court also has diversity jurisdiction over the federal and state claims pursuant to 28 U.S.C. Section 1332, because the matter in controversy exceeds $75,000 exclusive of interest and costs for each named Plaintiff, and there is complete diversity between all Plaintiffs and the Defendant.

IV. INTRADISTRICT ASSIGNMENT

29. Venue properly lies in this Court pursuant to 28 U.S.C. §1391 (b) and (c) because DCAG does business and maintains a primary place of business within the State of California and within the district of this Court. In particular, DCAG maintains a facility known as DaimlerChrysler Research and Technology Center North America at 1510 Page Mill Road, Palo Alto, California 94306, and it operates its world-wide e-business operations through offices in Palo Alto.

V. FACTS

30. In 1975, amidst labor strife between MBA and its workers, and amidst labor strife in general in Argentina, MBA signed an accord in which it agreed to set aside one percent of its sales for the "eradication of the negative elements of the factory." This accord was officially approved by the national Labor Ministry of Argentina.

31. Shortly after Mercedes signed the above-referenced accord, a majority of workers at the MBA plant in Gonzalez-Catan elected an independent

commission to represent them in discussing wages and other terms and conditions of employment with MBA. This commission came to be known as "the group of nine" or the "Internal Commission." MBA refused to negotiate with this Internal Commission. In response, approximately 4,000 workers went out on strike in support of the demand that MBA recognize and bargain with the Internal Commission. MBA discharged 117 of these striking workers whom Klaus Oertel, then an officer of DaimlerBenz and chief Director of MBA, characterized as "known activists, [and] extreme elements." The firing of these workers was ratified by the Labor Ministry of Argentina which declared the strike illegal.

32. Subsequently, a high-ranking official of MBA, Heinrich Metz, was kidnapped. Mr. Metz was ultimately released unharmed. In response to this kidnapping, MBA Director of Legal Affairs Ruben Cueva sent a declaration to the political police of Argentina in which he singled out four ex-workers of MBA, including Plaintiff Eduardo Olasiregui, as the potential perpetrators of this kidnapping. As Cueva explained in this October 24, 1975 letter, all of these four suspects had been workers and activists at MBA, but had been discharged no later than October of 1974. Cueva in this same letter insinuated that the kidnapping was linked to the strike in the MBA plant in 1975 in which workers demanded that MBA recognize and bargain with the Internal Commission. Cueva then went out of his way in this same letter to name all of the members of this Commission, including Plaintiffs Eduardo Estivill and Jose Barreiro and to provide the political police with their home addresses.

33. In 1976, shortly after the aforementioned events, the military overthrew the democratically-

elected President of Argentina, Isabel Peron, and set up a military junta which governed over Argentina until 1983. During the period of this military rule, approximately 30,000 individuals were kidnapped, tortured and "disappeared" by the military and police forces. A disproportionate number of these "disappeared" were blue collar workers with trade union affiliations.

34. The height of the military repression, including the "disappearances," occurred in the first year following the coup, from 1976 through 1977. As indicated in a March 22, 1977 memorandum of MBA, MBA approved of the methods of the military and police during this period, stating that "[i]n those days you achieved important results in the military reaction against the guerilla, among other things, one of those responsible for the kidnapping of Metz was eliminated. In general the result of the government's methods during its first year were favorable and open good prospects for the development of the country."

35. During this period of intense repression from 1976 through 1977, MBA, fully aware of the conduct of the military and police in "disappearing" individuals they perceived as "subversive" or "extremist," maintained close ties with high-ranking members of the military and police forces and utilized these forces to rid its plant in Gonzalez-Catan of individuals MBA itself viewed as "subversive" and as slowing production, including leaders and supporters of the independent commission. To this end, MBA, through various high-ranking employees/officials – including Director of Human Resources Pedro de Elias, Director of Legal Affairs Ruben Pablo Cueva, and Director of Production Juan Tasselkraut – had members of the military and police forces stationed within the

Gonzalez-Catan plant, opened the plant to periodic raids by these forces and identified to these forces which workers it deemed to be "subversive." These MBA officials did so with the full knowledge that the singling out of alleged "subversives" to these military and police forces would foreseeably result in the summary apprehension, detention, torture and "disappearance" of such individuals.

36. As a recently declassified U.S. State Department document noted, as a general matter, management of corporations in Argentina collaborated with the state security forces in this repression in order to rid the corporations of labor agitators. As this document, a wire from the U.S. Embassy in Buenos Aires to the U.S. Secretary of State written in June of 1978, explained: "WE BELIEVE THERE IS A GREAT DEAL OF COOPERATION GENERALY BETWEEN MANAGEMENT REPRESENTATIVES AND THE SECURITY AGENCIES AIMED AT ELIMINATING TERRORIST INFILTRATORS FROM THE INDUSTRIAL WORK PLACES AND AT MINIMIZING THE RISK OF INDUSTRIAL STRIFE." This same document noted the disturbing trend, particularly in the first years of the military coup, of "DENUNCIATIONS FROM MANAGEMENT OF ALLEGED TERRORIST ACTIVITIES IN THE PLANTS WHICH MAY BE LITTLE MORE THAN LIEGITIMATE [sic.](ALBEIT ILLEGAL) LABOR UNREST." MBA's collaboration with the security forces in dealing with its labor unrest was typical of the period.

37. This collaboration between Argentine authorities and corporations generally, and MBA in particular, emanated from their shared aim of ridding industry of labor union activity. This aim is set forth in the following statement by the Minister of Labor

on November 12, 1977: ". . . the Government and the Armed Forces have committed their resources and maximum effort to guaranteeing the freedom to work, and family and individual security for management and workers, and the annihilation of that public enemy. But it is worth remembering that those who deviate from the course taken by the 'Process' in search of individual or group benefit become accomplices of that subversion which must be destroyed, as do those who lack the courage to assume the responsibilities imposed by this situation."

38. The individuals MBA singled out to the authorities as "subversives" included all of the Plaintiffs in this case: Oscar Alberto Alvarez Bauman, Miguel Grieco, Diego Nuñez, Esteban Reimer, Alberto Francisco Arenas, Alberto Gigena, Fernando Omar del Connte, Hector Belmonte, Jorge Leichner, Hector Ratto, Eduardo Olasiregui, Ricardo Martin Hoffman, Eduardo Estivill, Alfredo Manuel Martin, Juan Jose Martin, Jose Barreiro and Alejandro Daer. All of these individuals were activists in the Internal Commission.

39. The first Plaintiff to fall victim to MBA's campaign against independent activists was Juan Jose Martin. On April 29, 1976, Plaintiff Juan Jose Martin was kidnapped by military and police forces directly from his post at work at the MBA plant in Gonzalez-Catan. The forces engaged in this kidnapping were directed by MBA officials, including Director of Human Resources Pedro de Elias and Director of Production Juan Tasselkraut, to Juan Jose Martin and were told by these same MBA officials that he was a "subversive." Juan Jose Martin was held in the custody of the military in the police station of San Justo without warrant or charges for 19 days, during which time he was physically and mentally

tortured by the military. This torture included electroshocks to Mr. Martin's person. Ruben Lavallen, the Chief of this police station at the time, oversaw the torture and interrogation of Mr. Martin and did so with the knowledge and approval of Director of Human Resources Pedro de Elias.

40. On May 5, 1976, during this period of captivity, Pedro de Elias wrote a memorandum in which he stated that Juan Jose Martin was being detained by military authorities. As Pedro de Elias wrote in referring to Martin, "the military authorities detained a worker inside the plant in the search of his home prohibited Marxist books were found." Juan Jose Martin was finally released alive after his 19 days of captivity as a result of the protest of fellow workers and union activists.

41. On December 14, 1976, Plaintiff Alfredo Martin, a union leader, was kidnapped from his home by police forces, including station Chief Ruben Lavallen, and brought to the police headquarters in San Justo where he was held for hours without warrant or charges. During his period of captivity, Alfredo Martin was physically and mentally tortured by both military forces and Ruben Lavellen who, *inter alia*, submitted his body to electroshocks. Again, the kidnapping and torture of Martin were carried out by the police forces with the knowledge and approval of MBA officials, including Pedro de Elias. When Martin returned to the MBA plant in Gonzalez-Catan after being held and tortured, Director of Production Juan Tasselkraut was waiting for him and acknowledged that he knew exactly what had happened with Martin.

42. Also on the night of December 14, 1976, union activist Miguel Grieco, a worker at the MBA

plant in Gonzalez-Catan was forcibly kidnapped from his home by police forces at the direction of MBA officials, including Director of Human Resources Pedro de Elias. Miguel Grieco was never seen or heard from again after this night. Mr. Grieco is presumed murdered and is officially listed as one of Argentina's "disappeared."

43. On January 5, 1977, Esteban A. Reimer, an active leader of the Internal Commission and one of the chief spokesmen for the workers at the MBA plant in Gonzalez-Caton, was seized at his home by members of the First Army Command in front of his family and taken away. These military forces carried with them a list upon which Reimer's name appeared. Before withdrawing from Reimer's home with Mr. Reimer in their custody, they crossed Mr. Reimer's name from this list. Reimer's family members searched for him at local police stations but no officials at these stations would acknowledge that Mr. Reimer had been apprehended. After his disappearance, he was seen only once again. Specifically, he was seen with fellow union leader and MBA employee Victor Hugo Ventura, who was also kidnapped on the night of January 5, 1977, at the police station of Ruben Lavallen. After that, neither Reimer nor Ventura were ever seen again. Both Reimer and Ventura are presumed murdered and are officially listed among Argentina's "disappeared."

44. The security forces who captured Mr. Reimer on the night of January 5, 1977 were acting upon intelligence given to them by MBA officials. Specifically, they were acting upon copies of personnel files which MBA gave to the military forces at the end of 1976 in which MBA accused him of distributing pamphlets endorsed by the Internal Commission and referring to him as an "agitator" who would "inte-

grate the Workers Movement of the Company." According to DCAG's own internal report of the events at issue in this lawsuit, a report just released in December of 2003, MBA's release of this information to the state security forces had foreseeably "fatal consequences" for Mr. Reimer.

45. Shortly thereafter, military forces came searching for and ransacked the homes of MBA workers and union activists Ricardo Martin Hoffman, Eduardo Estivill and Jose Barreiro. The military forces came looking for these individuals with the intent to kidnap and "disappear" them, as they had the others, based upon MBA's assertion to these forces that they were "subversives." In response to these activities of the military and in light of their knowledge of the kidnapping and disappearance of their co-workers as described above, Plaintiffs Hoffman, Estivill and Barreiro were forced into hiding and exile in fear for their very lives. Specifically, Hoffman and Estivill were forced to go into exile in Europe.

46. In August of 1977, tensions between MBA and the supporters of the Internal Commission became increasingly tense over a work slowdown initiated by the independent union activists. In early August of 1977, MBA Director of Human Resources Pedro de Elias wrote in a memorandum that "the factory finds itself in a critical situation . . . with serious consequences for the production." Shortly after this was written, union activists were systematically kidnapped and disappeared by police and military forces acting at the behest of MBA officials, including MBA Director of Production Juan Tasselkraut and MBA Director of Human Resources Pedro de Elias.

47. Specifically, between August 12 and August 19, 1977, MBA workers and independent union activists Oscar Alberto Alvarez Bauman (Aug. 4), Hector Ratto (Aug. 12), Fernando Omar Del Connte (Aug. 12), Alberto Gigena (Aug. 13), Hector Belmonte (Aug. 13), Diego Nuñez (Aug. 13), Jorge Alberto Leichner (Aug. 14) and Alberto Francisco Arenas (Aug. 19) were forcibly apprehended and kidnapped by military forces. Of these individuals, only Hector Ratto survived. All of these other individuals were never seen or heard from again. They are presumed murdered and are officially listed as Argentina's "disappeared." In the case of disappeared Alberto Gigena, his wife Plaintiff Graciela Beatriz Velazquez de Gigena witnessed his violent kidnapping from their home on the night of August 13. This kidnapping was carried out, as she witnessed, by police forces including station Chief Ruben Lavallen.

48. As for Hector Ratto, he was kidnapped directly from the MBA plant in Gonzalez-Catan by military forces acting at the direction of MBA Director of Production Juan Tasselkraut. Hector Ratto was held in a secret detention center for one and a half years, during which time he was regularly tortured by the police and military forces through, *inter alia*, the electroshocking of his person. This electroshock torture resulted in Mr. Ratto's arms being paralyzed for over 2 months.

49. Other MBA workers and independent union activists, not represented in this lawsuit, were also "disappeared" during this period in August of 1977, including Juan Jose Mosquera and Charles del Carmen Grossi.

50. In addition, during this same period in August of 1977, military forces came searching for and

ransacked the homes of MBA worker and union activist Alejandro Daer. The military forces detained some family members of Alejandro Daer in an attempt to coerce them into telling them of Daer's whereabouts. The military forces came looking for Daer with the intent to kidnap and "disappear" him as they had the others based upon MBA's assertion to these forces that Daer was a "subversive." In response to these activities of the military and in light of their knowledge of the kidnapping and disappearance of their co-workers as described above, Plaintiff Alejandro Daer was forced into hiding and exile in fear for his life. Specifically, Daer was forced into exile in Brazil.

51. After this period in August of 1977 in which the aforesaid workers were detained, "disappeared" or forced into exile, MBA Director of Human Resources Pedro de Elias wrote in an MBA memorandum that the actions of the military in ridding MBA of these workers had, as anticipated, ended the production slowdown and were welcome by MBA. As he wrote, "the workers of MBA detained by the security forces were still not freed. In the factory they calmed the situation but they have not normalized it. The strike ended on Friday and without it the production has returned to its maximum performance."

52. MBA, with full knowledge and approval of police station Chief Ruben Lavallen' s participation in the crimes as described above, hired Mr. Lavallen as Chief of Security for MBA in 1978. In addition, MBA and DCAG provided legal representation to Ruben Lavallen in criminal proceedings related to Mr. Lavallen' s human rights abuses. In so hiring Lavallen and providing legal defense to him, MBA and DCAG formalized the agency relationship which it maintained with Lavallen throughout the period

described above when the independent union activists were kidnapped, tortured and disappeared and ratified Lavallen' s conduct in participating in these crimes.

53. Plaintiff Eduardo Olasiregui, who had been accused by MBA Director of Legal Affairs Ruben Cueva as one of the suspected kidnappers of MBA official Metz, was arrested by official police forces and imprisoned for two and a half years as a result of this charge. This charge had been maliciously leveled by Cueva as retaliation for Olasiregui's union activities. Olasiregui was later exonerated and pardoned for the kidnapping of Metz, but not before he lost years of his life to imprisonment.

54. Defendant DCAG and its alter ego and/or agent, MBA (now known as "DCA") are vicariously liable for all of the aforementioned tortious actions as they were committed in furtherance of MBA's business interests and activities and with the advance knowledge, acquiescence and subsequent ratification of MBA and DaimlerBenz, the predecessor-in-interest of DCAG. Defendant DCAG itself has recently ratified these tortious acts through its actions as detailed above in paragraph 23. Further, all of the wrongful acts alleged herein were committed by individuals retained as employees or agents of MBA, making DCAG, through the agents of its alter ego or agent, MBA, directly or vicariously liable for all of the wrongful acts.

55. Plaintiffs do not have an adequate forum in Argentina in which to bring the instant action. This is so because, despite very recent changes in the central government of Argentina, the Argentine courts are still filled with corrupt judges from the period of the repression. Moreover, the judiciary of Argentina

is not independent, but rather, is greatly susceptible to political influence, particularly by large multinational interests such as Defendant DCAG. In addition, Plaintiffs have a legitimate fear of reprisal if they bring this action in Argentina because the police and military forces are also filled with officials left over from the repression and because people continue to be threatened for speaking out against the injustices which occurred during the time of the military dictatorship. Indeed, Alfredo Martin was recently the subject of a kidnap attempt, and he was threatened that if he continued to speak out about his treatment during the military dictatorship, he would be kidnapped. Civil cases in Argentina routinely take over 10 years to reach decision, and the remedy provided in analogous civil cases is inadequate. Plaintiffs in civil cases in Argentina do not have a right to a jury, nor are punitive damages available.

56. While the events at issue in this case took place some time ago, the statute of limitations in this case should be tolled because MBA, and the police and military forces it conspired with, actively attempted (many times successfully) to hide their crimes by "disappearing" the bodies of the victims. The bodies of all the "disappeared" at issue in this case have never been found. The destruction of evidence by the "disappearance" of the individuals in this case have also severely hampered and delayed the attempts of the surviving Plaintiffs in this case to ascertain the facts surrounding their victimization and to ascertain the identity of those responsible for their victimization. In addition, after the military dictatorship, the government of Argentina passed immunity laws which protected those guilty of the crimes committed during the dictatorship and there-

by assured that the facts surrounding these crimes would not come to light. These immunity laws remain on the books to this day. As a result, the facts of this case have only recently emerged in the past few years.

VI. DEFENDANT'S VIOLATIONS OF LAW

57. Defendant's actions as hereinabove alleged violate, and Plaintiffs' causes of action arise from, the following laws, agreements, conventions, resolutions and treaties, which constitute specific examples of the applicable law of nations or customary international law:

a. Alien Tort Claims Act, 28 U.S.C. § 1350;

b. Torture Victims Protection Act, 28 U.S.C. § 1350;

c, Common law of the United States of America;

d. United Nations Charter, 59 Stat. 1031, 3 Bevans 1153 (1945);

e. Universal Declaration of Human Rights, G.A. Res. 217A(iii), U.N. Doc. A/810 (1948);

f. International Covenant on Civil and Political Rights, G.A. Res. 2220A(xxi), 21 U.N. Doc., GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966);

g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. Doc., GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)(ratified 10/28/98);

h. Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment, G.A. Res. 3452, 30 U.N. Doc., GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1976);

i. Vienna Declaration and Programme of Action (World Conference on Human Rights, 1993);

j. Article 3 of the Geneva Conventions; and

k. Statutes and common law of the State of California, including but not limited to, wrongful death, negligence, and recklessness.

VII. CLAIMS FOR RELIEF

First Cause of Action

(For Extrajudicial Killing on Behalf of Category I Plaintiffs Against Defendant)

58. Plaintiffs incorporate by reference paragraphs 1 through 57 of this Complaint as is set forth herein.

59. Defendant, or Defendant's employees or agents, engaged in acts of intentionally and tortiously causing the apprehension, torture, deaths and disappearances of worker activists Oscar Alberto Alvarez Bauman, Miguel Grieco, Diego Nuñez, Esteban A. Reimer, Alberto Francisco Arenas, Alberto Gigena, Fernando Omar Del Connte, Jorge Leichner and Hector Belmonte. Specifically, as is alleged above, Defendant, operating under color of law, conspired and acted jointly with the Argentina military and police to have these workers kidnapped, tortured and murdered. Defendant's employees and/or agents, including high-ranking officials Pedro de Elias and Juan Tasselkraut, acting in the furtherance of Defendant's business interests, carried forth this conspiracy to disappear these workers. In addition, Defendant aided and abetted the Argentina military and police by providing significant moral and logisti-

cal support, supplies, intelligence and other substantial assistance that contributed to the ability of the Argentine police and military to carry out the murder and disappearances of Oscar Alberto Alvarez Bauman, Miguel Grieco, Diego Nuñez, Esteban A. Reimer, Alberto Francisco Arenas, Alberto Gigena, Fernando Omar Del Connte, Hector Belmonte and Jorge Leichner. Defendant furthermore ratified the participation of police station chief Ruben Lavallen in a number of these crimes when, with full knowledge of this participation, it hired him as its Chief of Security after the crimes were committed. These acts violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 57, *supra*. The acts described herein are actionable under the ATCA and the TVPA, and, if such a showing is required, were done jointly with the official armed forces of Argentina.

60. Defendant's conduct in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 57, *supra*, resulted in the deaths of Plaintiffs' family members. Defendant is directly liable for these violations of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 57, *supra*. Defendant is also vicariously liable for any violations of its employees or agents of the law of nations, customary international law, and worldwide industry standards and practic-

es, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 57, *supra*.

61. Plaintiffs seek compensatory and punitive damages, in amounts to be ascertained at trial, for the losses and suffering they endured as a result of the murder of their loved ones named herein. Plaintiffs' losses and suffering are particularly acute in light of the fact that their loved ones were "disappeared" and their bodies never found, preventing them from ever obtaining closure over their deaths. Indeed, the lives of the Plaintiffs have been invariably shattered as a result of these disappearances. Plaintiffs, as the heirs of these disappeared workers, also seek compensatory and punitive damages, amounts to be ascertained at trial, for the losses and suffering endured by these individuals as a result of the wrongful actions of the Defendant herein.

Wherefore, Plaintiffs pray for relief as set forth below.

Second Cause of Action
(For Torture on Behalf of Category II Plaintiffs Against Defendant)

62. Plaintiffs incorporate by reference paragraphs 1 through 61 of this Complaint as if set forth herein.

63. The acts described herein placed Plaintiffs in great fear for their lives and caused them to suffer severe physical and mental pain and suffering. Defendant is responsible for these acts based on the relationships alleged herein, particularly with reference to paragraphs 60-61 above. Plaintiffs have been subjected to acute and continuing emotional and physical trauma as a result of their being kidnapped, arbitrarily imprisoned, electroshocked and/or forced

into exile. This continuing emotional and physical trauma of the Plaintiffs includes severe depression, headaches, nightmares, lack of concentration and suicidal urges. The severe suffering of Plaintiffs was a foreseeable and intended consequence of Defendant's actions described herein. Defendant acted with knowing disregard for the life and well-being of the Plaintiffs. The acts of Defendant amounted to the torture of Plaintiffs and violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 57, *supra*.

64. The acts described herein were inflicted deliberately and intentionally for purposes which include, among others, punishing the victim or third persons, and constitute torture in violation of the laws of nations as described above in paragraph 57, *supra*, and are therefore actionable under both the ATCA and the TVPA.

Wherefore, Plaintiffs pray for relief as set forth below.

Third Cause of Action
(For Crimes Against Humanity on Behalf of All Plaintiffs Against Defendant)

65. Plaintiffs incorporate by reference paragraphs 1 through 64 of this Complaint as if set forth herein.

66. The apprehension, kidnapping, detention, torture and disappearance of the individuals named in this action were neither random nor occasional but widespread and systematic. These acts occurred under the direction, encouragement and acquiescence of Defendant and in furtherance of Defendant's

business. Defendant is responsible for these acts based on the relationships alleged herein, particularly with reference to paragraphs 60-61 above. As a result of these acts, all of the Plaintiffs have been subjected to acute and continuing emotional and physical trauma, including severe depression, headaches, nightmares, lack of concentration and suicidal urges.

67. The acts described herein constitute crimes against humanity, in violation of the laws described in paragraph 57 above, and are therefore actionable under the ATCA. Customary international law prohibits inhumane acts of a very serious nature such as kidnapping, willful killing, torture, arbitrary detention, forced exile and other inhumane acts committed as part of a widespread or systematic attack against any civilian population. Leaders, organizers, instigators and accomplices participating in the formulation of these acts, such as Defendant here, are responsible for all acts performed by any person in execution of such plan.

Wherefore, plaintiffs pray for relief as set forth below.

Fourth Cause of Action

(For Cruel, Inhuman and Degrading Treatment on Behalf of All Plaintiffs Against Defendant)

68. Plaintiffs incorporate by reference paragraphs 1 through 67 of this Complaint as if set forth herein.

69. The acts described herein had the intent and the effect of grossly humiliating and debasing Plaintiffs, inciting fear and anguish and breaking their will and physical and moral resistance. As a result of these acts, all of the Plaintiffs have been subjected to acute and continuing emotional and physical

trauma, including severe depression, headaches, nightmares, lack of concentration and suicidal urges. Defendant is responsible for these acts based on the relationships alleged herein, particularly with reference to paragraphs 60-61 above.

70. Plaintiffs were placed in great fear for their lives and the lives of their loved ones and were forced to suffer severe physical and psychological abuse and agony.

71. The acts described herein constitute cruel, inhuman and degrading treatment in violation of the laws described in paragraph 57 and are therefore actionable under the ATCA.

Wherefore, Plaintiffs pray for relief as set forth below.

Fifth Cause of Action
(For Wrongful Death on Behalf of Category I Plaintiffs Against Defendant)

72. Plaintiffs incorporate by reference paragraphs 1 through 71 of this Complaint as if set forth herein.

73. Defendant, or Defendant's employees or agents, acted in concert with Argentine military and police to commit acts that constitute wrongful death under the laws of the State of California and that caused the deaths of Oscar Alberto Alvarez Bauman, Miguel Grieco, Diego Nuñez, Esteban A. Reimer, Alberto Francisco Arenas, Alberto Gigena, Fernando Omar Del Connte, Hector Belmonte and Jorge Leichner. Plaintiffs, relatives and representatives of the estates of these deceased, seek damages herein for pecuniary loss resulting from loss of society, comfort, attention, services and support and for the loss-

es suffered by these murdered and "disappeared" individuals.

74. Defendant's actions were a direct and substantial cause of the deaths of Oscar Alberto Alvarez Bauman, Miguel Grieco, Diego Nuñez, Esteban A. Reimer, Alberto Francisco Arenas, Alberto Gigena, Fernando Omar Del Connte, Hector Belmonte and Jorge Leichner. Defendant failed to use due care to protect them from injury and harm, thereby proximately causing their wrongful deaths. Plaintiffs are entitled to recover compensatory and punitive damages in amounts to be ascertained at trial.

Wherefore, Plaintiffs pray for relief as set forth below.

Sixth Cause of Action

(For Intentional Infliction of Emotional Distress by All Plaintiffs Against Defendant)

75. Plaintiffs incorporate by reference paragraphs 1 through 74 of this Complaint as if set forth herein.

76. The conduct alleged herein on the part of Defendant constitutes extreme and outrageous conduct against the Plaintiffs.

77. Defendant intended to cause Plaintiffs to suffer severe emotional distress, or, in the alternative, Defendant engaged in the conduct with reckless disregard of the probability of causing these individuals to suffer severe and ongoing emotional distress.

78. Plaintiffs suffered and continue to suffer severe emotional distress and the outrageous conduct of Defendant was a cause of the emotional distress suffered by them.

79. Defendant's outrageous conduct constitutes the intentional infliction of emotional distress and is

actionable under the laws of California, the United States and Argentina.

Wherefore, Plaintiffs pray for relief as set forth below.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court to:

1. enter judgment in favor of Plaintiffs on all counts of the Complaint;
2. declare that Defendant has violated Plaintiffs' human rights and the laws of the State of California and the United States, as set forth herein;
3. award Plaintiffs compensatory and punitive damages in an amount to be proven at trial;
4. award Plaintiffs the costs of suit including reasonable attorneys' fees;
5. award Plaintiffs such other and further relief as the Court deems just under the circumstances.

Dated:
February 10, 2004

Respectfully submitted,

CHAVEZ & GERTLER LLP

INTERNATIONAL LABOR RIGHTS FUND

DANIEL M. KOVALIK

By: s/
KIM E. CARD

Attorneys for Plaintiffs
BARBARA BAUMAN, et al.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all issues so triable.

Dated:
February 10, 2004

Respectfully submitted,

CHAVEZ & GERTLER LLP

INTERNATIONAL LABOR RIGHTS FUND

DANIEL M. KOVALIK

By: s/
KIM E. CARD

Attorneys for Plaintiffs
BARBARA BAUMAN, et al.

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil Local Rule 3-16, the undersigned certifies that as of this date, other than the named Plaintiffs, there is no such interest to report.

Dated:
February 10, 2004

Respectfully submitted,

CHAVEZ & GERTLER LLP

INTERNATIONAL LABOR RIGHTS FUND

DANIEL M. KOVALIK

By: s/
KIM E. CARD

Attorneys for Plaintiffs
BARBARA BAUMAN, et al.

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Jose Division

BARBARA BAUMAN et al., Plaintiffs, v. DAIMLERCHRYSLER AG and DOES 1 through 50, inclusive, Defendant.	Case No.: CV 04-194 RMW **DECLARATION OF DR. PETER WASKÖNIG IN SUPPORT OF SPECIALLY-APPEARING DEFENDANT DAIMLERCHRYSLER AG'S MOTION TO QUASH SERVICE AND DISMISS FOR LACK OF PERSONAL JURISDICTION** **[FED R. CIV. P. 12(B)(2) & (5)]** Date: June 17, 2005 Time: 9:30 a.m. Courtroom: Six (6) H. Ronald M. Whyte

I, Dr. Peter Waskönig, declare as follows:

1. I am Vice President and General Counsel for DaimlerChrysler AG. I have personal knowledge of

the facts stated below and those facts are true and correct. In addition, I am familiar with the First Amended Complaint filed in this action. If called as a witness to do so I could and would testify competently to the following.

2. DaimlerChrysler AG is an *Aktiengesellschaft,* or German stock company, with its "seat," or effective place of business, in Stuttgart, Germany. Effective place of business is the German corporate law equivalent of the American principal place of business. Thus, DaimlerChrysler AG is governed by German law.

3. DaimlerChrysler AG does no business in the State of California and does not maintain any office, agency, or representative there. DaimlerChrysler AG does not have and has never had an office in Palo Alto, California, nor has it ever conducted fuel cell research in California. No one is authorized by DaimlerChrysler AG to accept service of process in California, nor has DaimlerChrysler AG ever appointed an agent for service of process in California. DaimlerChrysler AG is not now, nor has it ever been, engaged in business in California. DaimlerChrysler AG is not now, nor has it ever been, qualified, licensed, or authorized to do business in California. DaimlerChrysler AG does not have and never has had any officers, employees, or agents stationed to work for it in California.

4. DaimlerChrysler AG does not conduct any manufacturing, sales, or service activities in California. DaimlerChrysler AG does not have and never has had California bank accounts. It does not now own, nor has it ever owned or leased, California real estate. It has never paid California taxes.

5. DaimlerChrysler AG has no direct subsidiaries in California. DaimlerChrysler Research and Technology North America, Inc. ("DCRTNA") is a Delaware corporation with its principal place of business at 1510 Page Mill Road in Palo Alto, California. DCRTNA is a research company that is a subsidiary of DaimlerChrysler North America Holding Corporation ("DCNAHC"), a Delaware corporation with its principal place of business in Michigan, which in turn is a subsidiary of DaimlerChrysler AG. DCRTNA does not "operate world-wide e-business operations" for DaimlerChrysler AG, and does not otherwise participate in the sale, distribution, or testing of Mercedes-Benz vehicles.

6. DaimlerChrysler AG is independent from DCRTNA and DCNAHC and strictly observes all corporate formalities necessary for its own legal existence separate from DCRTNA an DCNAHC. DaimlerChrysler AG does not control the day-to-day affairs of DCRTNA or DCNAHC. DCAG is only one among a number of DCRTNA customers.

7. DaimlerChrysler AG manufactures Mercedes-Benz automobiles, but has never sold any Mercedes-Benz automobiles in California. At all times relevant to this action, Mercedes-Benz USA, LLC ("MBUSA"), a separate Delaware limited liability company with its principal place of business in New Jersey, held and still holds the right to import, sell, distribute, and advertise Mercedes-Benz vehicles and component parts within the United States, including California. Advertising for Mercedes-Benz products in the United States is conducted by MBUSA, not DaimlerChrysler AG.

8. MBUSA is a subsidiary of DCNAHC. MBUSA and DaimlerChrysler AG are independent

companies and DaimlerChrysler AG strictly observes all corporate formalities necessary for its own legal existence separate from MBUSA. DaimlerChrysler AG does not control the day-to-day affairs of MBUSA.

9. As its name would suggest, DCNAHC is a holding company. It does not manufacture, test, design, market, sell, or conduct technical research regarding Mercedes-Benz vehicles.

10. DaimlerChrysler AG sells Mercedes-Benz vehicles to MBUSA in Germany. Once title to the vehicles passes to MBUSA in Germany, DaimlerChrysler AG has no control over their ultimate destination within the United States. MBUSA (not DaimlerChrysler AG) imports them into the United States, and distributes them to independent Mercedes-Benz dealerships. None of the independent dealerships who ultimately sell vehicles in California are direct or indirect subsidiaries of DaimlerChrysler AG. DaimlerChrysler AG has not entered into contracts with any of them. MBUSA (not DaimlerChrysler AG) provides service and sales support throughout the United States, including California. DaimlerChrysler AG makes no warranties to U.S. consumers, including individuals in California, concerning the operation of any Mercedes-Benz vehicle.

11. Jurgen Schrempp holds a position in DaimlerChrysler AG. Mr. Schrempp is a German citizen and resident, and his office is in Stuttgart, Germany. Mr. Schrempp has no office, residence, or presence in Auburn Hills, Michigan. The facility at 1000 Chrysler Drive in Auburn Hills is the headquarters of DaimlerChrysler Corporation ("DCC")—a distinct and independent Delaware corporation with its principal place of business in Michigan. Mr. Schrempp

was not present at DCC's headquarters in Michigan during plaintiffs' attempts to serve him on March 3 and March 10, 2005.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 13th day of April 2005 at Stuttgart, Germany.

s/ Dr. Peter Waskönig

Dr. Peter Waskönig

Pursuant to General Order 45, Section X.B., I hereby attest that I have on file the holograph signature for the conformed signature indicated above in this e-filed document.

s/ Matthew J. Kemner

Matthew J. Kemner
Attorney for Specially-Appearing Defendant
DAIMLERCHRYSLER AG

EXHIBIT C

Ministry of Justice, Security and Human Rights

Buenos Aires, April 23, 2004

Executive Director, CELS
Victor Abramovich

I am writing in response to your request related to the reparation policies implemented by the State.

I can inform you that:

1. 6,593 applications have been submitted for benefits under Act 24,411 by the assigns of disappeared persons; 4,984 of these have received a favorable resolution.
2. 1,720 applications have been submitted for benefits under Act 24,411 by the assigns of assassinated persons; 1,046 of these have received a favorable resolution, and 130 a negative resolution.
3. 86 applications for reparation benefits have been submitted by members of the Armed Forces and Security Forces.
4. 14,092 applications have been submitted for benefits under Act 24,043; 7,698 of these have received a favorable resolution.

Sincerely,

[signature]
Dr. Mercedes Stasi de Oyuela
TECHNICAL COORDINATOR

THIS IS TO CERTIFY THAT
THIS IS A TRUE AND CORRECT
TRANSLATION FROM SPANISH
TO THE BEST OF MY KNOWLEDGE
AND BELIEF
INTERNATIONAL EFFECTIVENESS
360 PINE ST. - 3RD FLOOR
SAN FRANCISCO, CA 94104

TRANSLATION NO. 19061
SIGNED s/

* * *

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Jose Division

BARBARA BAUMAN et al., Plaintiffs, v. DAIMLERCHRYSLER AG and DOES 1 through 50, inclusive, Defendant.	Case No.: CV 04-194 RMW **DECLARATION OF DR. STEFAN RÜTZEL IN SUPPORT OF SPECIALLY-APPEARING DEFENDANT DAIMLERCHRYSLER AG'S MOTION TO QUASH SERVICE AND DISMISS FOR LACK OF PERSONAL JURISDICTION** **[FED R. CIV. P. 12(B)(2) & (5)]** Date: June 17, 2005 Time: 9:30 a.m. Courtroom: Six (6) Hon. Ronald M. Whyte

I, Dr. Stefan Rützel, hereby declare as follows:

1. I am a member of the Frankfurt bar and I am licensed to practise law in Germany. I am a partner

in the law firm of Gleiss Lutz with offices *(inter alia)* in Frankfurt. I currently head the litigation / dispute resolution department of Gleiss Lutz.

2. I studied law at the Universities of Speyer and Frankfurt in Germany (state exams 1988 and 1992, Dr. jur. 1995) and the University of Georgia School of Law in the United States of America (Master of Laws 1994). I worked as a teaching assistant at the law faculty of the University of Frankfurt in 1988 and 1989. I have published intensively in the area of German and international law on dispute resolution.

3. From 1994 to 2000, I worked with the law firm Pünder, Volhard, Weber & Axster (now Clifford Chance) in Frankfurt where I was made partner in 1999. In 2000, I joined the Frankfurt office of the law firm Bruckhaus Westrick Heller Löber (now Freshfields Bruckhaus Deringer), which I left in 2002 to join the Frankfurt office of Gleiss Lutz. My practice concentrates on litigation / dispute resolution in the national and international field.

4. I am a member of the German Bar Association, the International Bar Association, the German-American Lawyer's Association, and numerous other professional organisations. I serve as Chairman of the Board of Trustees of the Beilstein Institute for the Advancement of the Chemical Sciences, Frankfurt, and as a member of the supervisory board of Comtrade AG, Hamburg.

5. I have prepared this Declaration at the request of the Specially Appearing Defendant DaimlerChrysler AG in support of its motion to dismiss.

6. In preparation of this Declaration, I have reviewed the First Amended Complaint filed by Barbara Bauman and other named plaintiffs ("Plaintiffs")

against Defendant DaimlerChrysler AG. I am of the opinion that Germany is a suitable alternative forum for the causes of action alleged by the Plaintiffs. While I have no opinion on the merits of the First Amended Complaint or the facts underlying the dispute, I am of the opinion that a German court could hear and award compensation for the type of claims alleged by the Plaintiffs.

I. The German Legal System and Human Rights

7. The Federal Republic of Germany is an independent and sovereign republic. It is a democracy with a freely elected representative government and with a judiciary that provides for full and fair litigation of claims. Pursuant to the Basic Law of 1949 *(Grundgesetz, GG),* the German constitution, the government is divided into three separate and independent branches: executive, legislative, and judiciary.

8. The current German legal system is based on the Basic Law. In view of the gross violations of human rights during the *Nazi* regime in Germany between 1933 and 1945, the fathers of the Basic Law took great care to incorporate guarantees and safeguards in order to protect the democratic system, the rule of law, the independence of the courts, and individual rights. Accordingly, the Basic Law contains extensive guarantees of individual rights. These include from a procedural standpoint the guaranty of the right to jurisdiction of the lawful judge (Article 101 GG), and the guaranty of due process of law (Article 103 GG). In addition, extensive provisions in the Basic Law guarantee the sanctity of human dignity and the protection of individual liberty, of personal integrity and of the sanctity of life (Articles 2

(1), 2 (2) and 1 (1) GG). The extensive guaranties of individual and human rights in the Basic Law not only serve as a safeguard against violations by the German government, they also have the function of a guideline for the legislative branch when enacting new laws and for the judiciary in applying these laws. Therefore, a German court applying German law has to take into account the basic values as set out in the guarantees of individual and human rights in the Basic Law. Failure to do so makes a judgement subject to appeal. In addition, the Federal Constitutional Court has the powers to reverse the violating measure such as a judgement (Article 93 GG).

9. At the heart of civil law in Germany is its Civil Code *(Burgerliches Gesetzbuch, BGB),* which contains a systematic set of general principles and specific rules governing *inter alia* contracts, torts, domestic relations, and damages. The Civil Code is a federal statute that is in effect throughout all of Germany.

II. The German Legal System and the Law of Nations

10. As mentioned before, the German legal system is designed to vigorously safeguard the basic individual and human rights. This safeguard applies regardless of the nationality of the individual. In addition, German law accepts and observes the rules determined by the Law of Nations. The Basic Law contains provisions to the effect that the Law of Nations becomes an integral part of the German legal system.

11. Article 25 of the Basic Law states as follows: "The general rules of public international law constitute an integral part of federal law. They take prec-

edence over statutes and directly create rights and duties for the inhabitants of the federal territory". Accordingly, the general rules of the Law of Nations, including the rules on the protection of human rights, have the force of law in Germany, and even take precedence over all federal (and state) laws.

12. Articles 32 and 59 of the Basic Law empower the federal government to conclude international treaties. Accordingly, the Federal Republic of Germany has signed and ratified, *inter alia,* the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Vienna Declaration and Program of Action, and Article 3 of the Geneva Conventions. All of these conventions and international treaties have been incorporated into German law and have the same binding effect as any other provision of German federal law.

13. German law therefore extensively protects the basic individual and human rights not only through the guarantees contained in the Basic Law, but also by treating the relevant parts of the Law of Nations as part of German federal law.

III. Jurisdiction to Hear this Case

14. The courts of Germany could exercise jurisdiction over this lawsuit against Defendant DaimlerChrysler AG. It is well established in German law that the international jurisdiction of the German courts follows the domestic rules on local jurisdiction *(Bundesgerichtshof,* Neue Juristische Wochenschrift

(NJW) 1999, pp. 1395, 1396) unless the Council Regulation (EC) No. 44/2001 of 22 December 2000, the 1988 Lugano Convention or the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, or other international treaties provide for something else. As regards this ease, none of them does so. Furthermore, none of the relevant causes of action causes an exclusive jurisdiction of a court which would bar the jurisdiction of the German court.

15. According to Sections 12 and 17 of the German Code of Civil Procedure *Zivilprozessordnung,* "ZPO"), a stock corporation such as DaimlerChrysler AG can be sued in the civil courts of first instance having jurisdiction in the place where the stock corporation *(Aktiengesellschaft)* has its statutory seat. The statutory seat of DaimlerChrysler AG is Stuttgart, Germany. Accordingly, the courts of Stuttgart would exercise international and local jurisdiction if Plaintiffs file an action in a German court against DaimlerChrysler AG.

IV. Remedies Available under German Law

16. A German court will apply the German rules on international private law (conflicts of law) to determine the applicable substantive law. Arguably, a German court will apply German substantive law. Alternatively, the relevant substantive laws of the Republic of Argentina may apply. In this case, Section 293 ZPO requires the German judge to determine the relevant provisions of the applicable foreign law and how these provisions are interpreted in practice. In doing so, the courts are free to use any appropriate means. Therefore, a German court would request the parties to submit expert opinions of lawyers, and possibly would retain an expert on

the laws of Argentina to establish the applicable law. Thereafter, the German court would apply this law in the same way a court in Argentina would.

17. The First Amended Complaint seeks remedies for the harm Plaintiffs claimed to have suffered during the "Dirty War" in Argentina. Similar causes of action and compensation as alleged are available under German law.

18. According to Section 823 (1) BGB, a person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom. Section 823 (1) BGB would constitute a cause of action for the harm claimed by Plaintiffs in the First Amended Complaint.

19. According to Section 826 BGB, a person who wilfully causes damage to another in a manner contrary to good faith and public policy is bound to compensate the other for the resulting damages. By determining whether an act or an omission is "contrary to good faith and public policy" *(sittenwidrig)*, the German courts are bound to observe the underlying values of the German legal system as spelled out in the extensive guarantees of basic individual and human rights in the Basic Law, and in the Law of Nations being part of German federal law *(Bundesverfassungsgericht,* Federal Constitutional Court Reporter (BVerfGE) 7, pp. 198, 206).

20. According to Section 31 BGB, a business association such as a German stock corporation *(Aktiengesellschaft)* is liable for any damage which the board, a member of the board or other duly appointed representative may, in carrying out his duty, cause a third party. This liability of the association for conduct of their officers is broadly interpreted by

the German courts *(Bundesgerichtshof,* Federal Court Reporter (BGHZ) 49, pp. 19, 20 et seq.). Accordingly, under German law, DaimlerChrysler AG could be liable for the conduct of its representatives as alleged in the First Amended Complaint.

21. In addition, pursuant to Sections 830, 840 BGB, German law acknowledges the liability of several person involved in tortious behaviour. According to Section 830 (1) BGB, if several persons through a jointly committed tort have caused damage, each of them is responsible for the full damages. The same applies if it cannot be discovered which of several participants has caused the damage through his action. According to Section 830 (2) BGB, instigators and accomplices are in the same position as joint actors. Pursuant to Section 840 (1) BGB, several persons being jointly responsible for the damage according to Section 830 BGB are liable as joint debtors. It is well established in German case law that the terms "instigators" and "accomplices" have to be interpreted broadly. Therefore, the courts have found it sufficient that an accomplice, by its conduct, was merely encouraging the actor to commit the tortious action *(Bundesgerichtshof,* Federal Court Reporter (BGHZ) 63, p. 125). Accordingly, Defendant DaimlerChrysler AG could be liable for the conduct as stated in the First Amended Complaint.

22. Sections 249 *et. seq.* BGB and Sections 842 *et. seq.* BGB address damages. According to the general rule of Section 249 BGB, a person who is obliged to make compensation shall restore the situation which would have existed if the circumstance rendering him liable to make compensation had not occurred. In case of Sections 823 (1) BGB and Section 326 BGB, this means that the person is to make compen-

sation in order to restore the situation as if his acts violating these provisions had not occurred.

23. According to Section 253 (2) BGB, in case of liability for damages resulting in, *inter alia,* a violation of the body, the health, or the freedom of an individual, the plaintiff may seek adequate compensation in money also for the damages which are not damages to property. This provision therefore provides for compensation in money for pain and suffering. This compensation may be requested by the person suffering such harm, or, if the violation caused the death of such person, by his heirs.

24. Pursuant to Section 842 BGB, the obligation to make compensation for any damage on account of a tort committed against a person extends also to the losses which the act caused to his earnings or prosperity. Pursuant to Section 843 BGB, a person may demand monetary damages if, in consequence of injury to the body or health, the earning capacity of the injured party is destroyed or impaired or if there is an increase in his needs. Pursuant to Section 344 BGB, in case of death of the injured person, any person such as spouses or children who stood in a relationship to the injured party by virtue of which he was or might be bound by law to furnish maintenance to them, may request monetary damages for the losses these parties suffer by the deceased not being able to furnish such maintenance. In addition, the cost of a funeral are to be compensated.

25. Accordingly, if the Plaintiffs can prove that the tortious conduct resulted in the harm they alleged, the Plaintiffs could be entitled under German law to extensive damages to compensate for any harm and for any losses suffered including damages for pain and suffering.

V. Conclusion

26. Germany provides an adequate and available alternative forum to resolve the dispute between Plaintiffs and Defendant as alleged in the First Amended Complaint.

27. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 3 day of June, 2005, at Frankfurt, Germany

By: s/
Dr. Stefan Ruetzel

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Jose Division

BARBARA BAUMAN et al, Plaintiffs, v. DAIMLERCHRYSLER AG and DOES 1 through 50, inclusive, Defendant.	Case No.: CV 04-194 RMW **DECLARATION OF JORGE DANIEL ORTIZ IN SUPPORT OF SPECIALLY-APPEARING DEFENDANT DAIMLERCHRYSLER AG'S MOTION TO QUASH SERVICE AND DISMISS FOR LACK OF PERSONAL JURISDICTION** **[FED R. CIV. P. 12(B)(2) & (5)]** Date: June 17, 2005 Time: 9:30 a.m. Courtroom: Six (6) Hon. Ronald M. Whyte

I, Jorge Daniel Ortiz, declare as follows:

1. Unless otherwise stated herein, I have personal knowledge of the facts set forth in this declaration. In addition, I am familiar with the First Amended Complaint filed in this action, as well as with plaintiffs' papers opposing DaimlerChrysler AG's motion to quash service and to dismiss for lack of personal jurisdiction. If called to testify as a witness regarding the following, I could and would do so under oath.

2. I am an attorney and the founding partner of the law firm Estudio Ortiz y Asociados S.A., 25 de Mayo 489, 4tn Floor, Buenos Aires, Argentina, and am admitted to the bar in the City of Buenos Aires, Argentina. Before founding Estudio Ortiz y Asociados, I held legal positions with Pillsbury Winthrop (New York, United States), C&C Becar Varela (Buenos Aires, Argentina) and American Express Travel Related Company (Miami, United States). I received my law degree from Buenos Aires University, graduating *Summa Cum Laude* in 1980. I am a professor of law at the St. Andrews University, a leading university in Buenos Aires. I also have been a member of the Board of Directors of several multinational companies, namely Nabisco Argentina S.A. (Chairman 1994-2000); Canale S.A. (a Nabisco/Kraft Foods subsidiary, Chairman 1998 to 2000); AT&T Argentina S.A. (Vice-Chairman, 1999 to 2002); CINBA S.A. (a Diageo subsidiary, Chairman 1998 to 2003). Further, I continue to hold a position as Legal Representative in Argentina for American Express Travel Related Services (1998-present) and IBM Corporation (1996-present).

3. I have reviewed the Declaration of Ricardo Monner Sans, filed with plaintiffs' opposition papers

on May 5, 2005 ("Moaner Sans Dec."). The declaration contains a number of misunderstandings and misstatements regarding Argentina and its laws, which I note and discuss below.

4. Mr. Monner Sans asserts that "the *[Bauman]* plaintiffs in the federal case being processed in the United State[s] cannot bring a civil suit against DaimlerChrysler AG" because Argentine law purportedly bars civil "complaints against 'juridicial' persons rather than individuals." Monner Sans Dec. ¶ 5. This is simply ***not*** true. Article 42 of the Argentine Civil Code explicitly states that "juridicial persons may be sued for civil actions, and the foreclosure of their assets may be pursued."

5. It is common practice in Argentina to file complaints against corporations. By way of example, daily lists of all commercial cases, including numerous complaints against corporations, filed before the Commercial Courts of the City of Buenos Aires may be reviewed through the website of the Commercial Court of Appeals of the City of Buenos Aires: www.cncom.gov.ar; select "Sorteos de Primera instancia."

6. Mr. Monner Sans indicates that "there are no legal provisions in force under Argentine law to sue a corporation for its responsibility in the violation of human rights. In summary, NO Argentine law currently in effect provides for the responsibility of subjecting a corporation to a lawsuit for such reasons." Monner Sans Dec. ¶ 6 (emphasis in original). Mr. Monner Sans is mistaken. Plaintiffs would in fact have the right to file a civil suit for damages against a corporation in Argentina based upon the injuries and damages alleged in the First Amended Complaint. Such a claim could be brought under numer-

ous provisions of the Argentine Civil Code imposing liability either for delicts or for quasi-delicts.

7. Delictual liability is governed by Articles 1072-1106 of the Civil Code. A delict is defined in Article 1072 as "every illicit act executed knowingly and with intent to damage another person or his rights . . . ." A delict may be a criminal offense and/or a civil wrong or tort. Quasi-delictual liability is governed by Articles 1107-1123 of the Civil Code. A quasi-delict is an illicit act committed with fault or negligence, and includes the type of vicarious tort liability imposed upon employers, whether legal entities or individuals, under the principal of respondeat superior.

8. The critical Civil Code articles setting out the elements of the cause of action and the types of recoverable damages include the following:

A. Article 1072 provides that an "unlawful act perpetrated intentionally and with the intent of harming the person or the rights of another is called a 'delict' in this Code." Article 1077 establishes that "[e]very delict gives rise to an obligation to repair the damage caused to another person thereby."

B. Article 1078 establishes that the obligation to repair the damages caused by illicit acts (delicts and quasi-delicts) includes compensation for moral damages (i.e., nonpecuniary damages, such as pain and suffering) caused to the victim, as well as indemnification of the losses and interest. The action for indemnification for moral damages belongs only to the person directly damaged; if the act caused the victim's death, only the heirs may bring the action.

C. Article 1079 states: "The obligation to repair the damage caused by a delict exists not only

regarding the person that has been directly damaged by the delict, but also with respect to any person that has been harmed as a result of the delict, even if only indirectly."

D. Article 1080 establishes that a husband and parents may sue for damages for the injuries caused to the wife and children.

E. Article 1084 requires that a perpetrator of a homicide pay all expenses associated with assistance to the victim, as well as funeral expenses and support to the widow and children. This amount is fixed by the discretion of the judge. Article 1085 establishes that the right to demand reparation for expenses associated with the victim belongs to the one who has paid these expenses. The right to support belongs solely to the surviving spouse and to the dependent children of the victim.

F. Article 1086 states: "[I]f the delict involved wounds or physical injuries, the reparation shall consist of the payment for all expenses for the cure and recovery of the injured person, and for all the earnings that he failed to make up to the day of his complete recovery."

G. Article 1087 states: "When the delict is against individual liberty, reparation shall consist solely of a sum corresponding to the total of the earnings that the victim ceased to receive, up to the day in which he was fully restored to freedom."

H. Liability for delicts extends not only to the perpetrator of the illicit act. All persons, including legal entities, that participated jointly in the delict, whether as perpetrators, counselors, or accomplices, are jointly and severally liable, even if the delict is not a criminal offense. *See* Civil Code Article 1081.

I. Article 1109 of the Civil Code also imposes an obligation to indemnify anyone who is injured by the negligence or fault of another. The principles for determining tort damages are similar to those prevailing for delictual liability. Specifically, Article 1109 states that "[e]very person that performs an act which, through his fault of negligence, causes damage to another, is obligated to repair the loss. This obligation is governed by the same provisions relating to delicts of the civil law."

J. In cases in which the same wrongful act entails both criminal and civil liability, Argentine procedure gives the injured party the right to bring an independent civil action for damages or to intervene in the criminal prosecution to seek damages as a querellante or "plaintiff-prosecutor," becoming a co-plaintiff with the public prosecutor. *See* John R. Gerber, Joinder of Civil and Criminal Relief, 22 SYRACUSE L. REV. 669 (1971). The civil action is independent of the criminal action and may be brought separately in the civil courts. *See* Civil Code Article 1096 in conjunction with Article 29(2) of the Penal Code. Article 1097 of the Civil Code provides that failure to bring a criminal action or desisting once having done so does not amount to a waiver of the right to bring a civil action for damages for the delict. If, however, a criminal prosecution is brought before the civil action, or while the criminal outcome is pending, the final decision on the civil action must be stayed pending the outcome of the criminal action. If the defendant is convicted, the conviction bars the defendant from contesting that the delict was committed, and that he committed it. *See* Civil Code Articles 1101 and 1102. Similarly, if the defendant is acquitted, the acquittal estops the plaintiff in the civil action from attempting to prove that the defendant

committed the act for which has been acquitted. *See* Civil Code Article 1103.

K. Under Argentine law, corporations can be held liable for damages caused by their directors, officers, or agents. Article 43 of the Civil Code states: "juridicial persons are liable for damages caused by those directing or managing them, while performing or exercising their functions. Juridicial persons are also liable for the damages caused by their agents or assets . . . ."

L. Furthermore, corporations arc responsible for the damages caused by its employees. Article 1113 of the Civil Code provides that "the obligation of a person that has caused damage extends to the damages caused by the persons dependent upon him, or by things he makes use of, or which are under his care."

M. Additionally, a principal may directly be sued irrespective of the fact that an agent is the author of the illegal action. Article 1122 of the Civil Code states that "persons sustaining damage by the acts of employees or servants can pursue the persons civily liable directly in the civil courts, and they are not obligated to bring into court the doers of the act."

9. Mr. Monner Sans indicates that the "Courts of Argentina demand, in civil cases such as this one, that the plaintiffs pay a price of entry (judicial tax) that is 3% of the total asked for." Monner Sans Dec. ¶ 14. He continues, noting that, "where the total asked for is several million dollars, such a payment would be insuperable because the plaintiffs are invariably from the poor working class of Argentina." Essentially, he states that the courts will be inaccessible to these Plaintiffs due to the high up-front judicial tax associated with bringing this type of lawsuit.

However, Mr. Monner Sans fails to point out that plaintiffs may be exempted from the court's fees if they apply for the procedure called "beneficio de litigar sin gastos" or "benefit to litigate without affording court fees." Argentine Federal Code of Civil and Commercial Procedure Article 78 provides that those lacking economical resources, before filing the complaint or at any time during the case, may request the granting of the benefit to litigate without affording the court fees. Moreover, the fact that the petitioner has enough resources to afford his living does not preclude this benefit. Official statistics as to the civil cases filed before the Civil Courts of the City of Buenos Aires during year 2003 indicate that there were 9,978 requests to litigate without affording the court fees. *See* www.pjn.gov.ar, Menu: "Information Gral," Section: "Modulo de Estadistica."

10. Mr. Manner Sans makes a bold assertion that there "are few economic interests as large as those of Mercedes Benz Argentina (now known as Daimler Chrysler) that was the number one foreign company in economic power in Argentina and that has much influence in Argentina and Buenos Aires." Monner Sans Dec. ¶ 9. He concludes by opining that the plaintiffs in a lawsuit against "Daimler Chrysler would not receive a fair evaluation of their claims in Argentine courts due to the probable influence of Daimler Chrysler over some Argentine judges." *Id.* To begin, Mr. Manner Sans' first assertion does not comport with research performed by "Mercado," one of Argentina's leading financial publications, which lists DaimlerChrysler Argentina S.A. in the 116th position in the ranking of companies by revenues in Argentina. Mercado, "Las 1000 de Mercado," June 2004. *See* http://www.mercado.com.ar/mercado.vernota.asp?id_producto=1_&id_edicion+1036&id_no-

ta+1. Neither DaimlerChrysler Argentina S.A. nor DaimlerChrysler AG have special power in Argentina, which will influence judges to rule in its favor. This is well-demonstrated by the recent decision in *In re Brito Lins, Stelio vs DaimlerChrysler AG.* On June 23 2003, Judge De la Cruz from the City of El Dorado, Province of Misiones, ordered DaimlerChrysler AG to pay AR$ 11 MM (USD 4MM approximately) for damages alleged in a product liability case.

11. Mr. Manner Sans states in Paragraph 15 that "there are no discovery procedures in civil cases in Argentina," and that "courts cannot oblige a defendant . . . to provide evidence to another plaintiff." This statement mischaracterizes the process of obtaining evidence in Argentina. Argentina is a civil law jurisdiction, and while there is no specified event or term called "discovery," the Code of Civil and Commercial Procedures account for the production of evidence. Specific examples from the Code follow:

A. Article 387 of the Code of Civil and Commercial Procedures provides that the parties and third parties who control documents essential to the examination of the case, are obliged to produce them or to indicate the file or archive where the originals are kept. The judge will order the showing of the documents, without stating reasons, within the term he indicates.

B. Article 388 of the Code of Civil and Commercial Procedures states that if the document is held by one of the parties, its submission will be requested within the term set forth by the judge. When upon other evidence the existence and content of a document is proven, failure to submit the document will create a presumption against the party.

C. Article 389 of the Code of Civil and Commercial Procedures sets forth that if a document, to be identified, is held by a third party, he will be compelled to submit it. The third party may oppose the submission if the document is his exclusive property and the third party shows submission may cause him damage.

D. Article 37 of the Code of Civil and Commercial Procedures provides that judges and courts may impose compulsive and progressive fines so that parties comply with their orders, which amount will be in favor of the party harmed by the breach. Fines may be applied to third parties in cases provided by law.

E. Article 426 of the Code of Civil and Commercial Procedures provides that any person older than 14 years may be proposed as a witness and shall have the duty to appear and testify, save for the exemptions provided by law.

F. Article 430 of the Code of Civil and Commercial Procedures states that when the parties intend to produce proof through witnesses, they shall submit a list of such witnesses with their names, occupation and domicile.

G. Article 431 of the Code of Civil and Commercial Procedures directs that the court will schedule an alternate hearing as a second hearing, on a date soon after the first hearing, in order to elicit the testimony of witnesses not attending to the first hearing, with the warning that failure to appear at the first hearing, without fair cause, will imply that the witness should attend the second hearing compelled by the police and with the imposition of a fine of AR$ 1,000.

H. Article 275 of the Penal Code states that any witness, expert or interpreter who states any falsehood, or denies or withholds the truth, totally or partially, in his deposition, report, translation or interpretation before any competent authority, shall be punished with jailing from one month to four years. If false testimony is committed in a criminal case to the detriment of the accused, the punishment will be imprisonment or jailing from one to ten years.

I. Article 276 of the Penal Code provides that any false witness, expert or interpreter whose deposition was obtained by bribery, shall be punished with a fine double that of the amount received or offered. The punishment of the briber shall be the same as for the false witness.

J. Article 449 of the Code of Civil and Commercial Procedures provides that if within a witness' testimony there is evidence of false testimony or another offense, the judge may order the arrest of the alleged offender.

K. Article 442 of the Code of Civil and Commercial Procedures sets forth that witnesses shall be freely interrogated by the judge or person who legally replaces him, as to the knowledge of the controversial facts, respecting the substance of the interrogatories. The opposing party may request that certain questions be asked, even when such questions lack a direct relation with the questions proposed by the party who offered the witness.

L. Article 396 of the Code of Civil and Commercial Procedures directs that reports requested to public offices, notaries and private entities shall be related to specific, well-individualized, controversial facts. They will be admitted only as to acts or facts arising from documents, files or accounting

registries of the third party. Also, the remittance of files, testimonies or certificates related to the trial may be requested of public offices.

M. Article 405 of the Code of Civil and Commercial Procedures sets forth that the legal representatives of a juridical person, corporation or collective companies, may be subpoenaed with power to oblige them.

N. Article 457 of the Code of Civil and Commercial Procedures sets forth that expert reports and tests will be admitted when the opinion on the controversial facts requires special skills on certain science, art, industry or technical activity.

12. Mr. Monner Sans' Declaration makes reference to "[t]ile most recent Report on Human Rights of the U.S. State Department, dated March 31, 2003," Monner Sans Dec. ¶ 7 ("2002 Report"). However, the most recent Report on Human Rights produced by the U.S. State Department is dated February 28, 2005, which is attached hereto as Exhibit "A" ("2004 Report").

13. Mr. Monner Sans refers to the 2002 Report language that there "exist 'credible accusations of efforts by members of the security force and others to intimidate the judicature and witnesses,' and also 'there are human rights organizations that are fighting to confront the same human rights abuses on which the case against Chrysler Daimler is based.'" The second portion of Mr. Monner Sans' quotation of the referenced 2002 Report does not even exist. Significantly, the 2004 Report deletes any reference to reports that security forces are attempting to intimidate the judiciary, witnesses, or human rights organizations.

14. The 2004 Report also recognized that "the government continued to pursue anti-corruption measures. Supreme Court justice Adolfo Vazquez, accused of malfeasance in office, resigned in the face of ongoing impeachment proceedings in the National Legislature. The Chamber of Deputies voted to send the impeachment case of another Supreme Court justice facing the same charges to the Senate for determination. Prosecutions of a number of former governmental officials accused of corruption continued." Furthermore, the 2004 Report states that "according to a survey conducted by international consulting firm KPMG, opinion leaders, including business executives, academics, and governmental bureaucrats, felt that the corruption in the country had significantly lessened over the past several years."

15. The most recent Human Rights Report by Human Rights Watch, attached hereto as Exhibit "B," states: "On a positive note, the Kirchner government continues to press for accountability for human rights violations committed during Argentina's period of military rule (1976-1983). At this writing, roughly one hundred former military and police officers had been detained, and several key trials were underway."

16. Further, and in contrast to Mr. Monner Sans' outdated reference in paragraph 9 of his declaration regarding the continued validity of the "final point" and "due obedience" laws, the Human Rights Watch Report stated: "following the congressional annulment in August 2003 of the 'full stop' and 'due obedience' laws—which had obstructed prosecutions of those responsible for human rights abuses committed during military rule—human rights trials continue to advance." (Emphasis added.) The Human

Rights Watch report has accurately characterized the state of the law in this regard.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 3rd day of June 2005, at Buenos Aires, Argentina

s/ Jorge Daniel Ortiz
Jorge Daniel Ortiz

Pursuant to General Order 45, Section X.B., I hereby attest that I have on file the holograph signature for the conformed signature indicated above in this e-filed document.

s/ Matthew J. Kemner
Matthew J. Kemner
Attorney for Specially-Appearing Defendant
DAIMLERCHRYSLER AG

EXHIBIT A

Argentina

Country Reports on Human Rights Practices – 2004
Released by the Bureau of Democracy, Human Rights, and Labor

February 28, 2005

Argentina is a federal constitutional democracy with an executive branch headed by an elected president, a bicameral legislature, and a separate judiciary. Free and fair presidential elections were held in April 2003; although no candidate gained sufficient votes to win in the first round, former President Carlos Menem withdrew his candidacy before the second round, and President Nestor Kirchner assumed office on May 25, 2003. The Constitution provides for an independent judiciary, but it was often inefficient and at times subject to political manipulation.

The President is the constitutional commander-in-chief, and a civilian Defense Minister oversees the armed forces. Several agencies share responsibility for maintaining law and order. In August, the President returned authority over the Federal Police (PFA), the Border Police, and the Coast Guard from the Ministry of Justice and Human Rights to the Secretary of Security, under the Ministry of Interior. The PFA has jurisdiction in the Federal Capital and over federal crimes in the provinces. Provincial police are subordinate to the provincial governors. While civilian authorities generally maintained ef-

fective control of the security forces, there were instances in which elements of the security forces acted independently of government authority. Some members of the security forces committed human rights abuses.

The country is resource rich and has a market-based economy and a population of approximately 36.2 million. Real economic growth was predicted to be 8.2 percent, while consumer price inflation was 6.1 percent. The purchasing power of salaried workers increased more than 3 percent during the year.

The Government generally respected the human rights of its citizens; however, there were problems in some areas. There were instances of killings and brutality by police and prison officials. Authorities prosecuted some police for such actions, although impunity remained a serious problem. Police corruption was also a problem, although the federal Government and the provincial governments in Buenos Aires and Cordoba removed corrupt police officials. Jails and prisons were often overcrowded. Police sometimes arbitrarily arrested and detained citizens. The judiciary continued to work through the legacy of human rights abuses committed during the "dirty war" of the 1976-83 military regime, and the Supreme Court ruled that crimes against humanity were not subject to statutes of limitations. Anti-Semitism remained a concern despite government efforts to combat it. A Federal Court in Buenos Aires acquitted 22 defendants charged with the 1994 bombing of the Buenos Aires Jewish Community Center. Domestic violence and sexual harassment against women were problems. There were reports of trafficking for sexual exploitation and labor. Child labor was a problem.

RESPECT FOR HUMAN RIGHTS

Section 1 Respect for the Integrity of the Person, Including Freedom From:

a. Arbitrary or Unlawful Deprivation of Life

There were no politically motivated killings by the Government or its agents; however, police and prison officers were responsible for killings involving the use of unwarranted or excessive force. The authorities investigated, and, in some cases, detained, tried, and convicted the officers involved.

In early December, the Coordinator against Institutional and Police Repression (CORREPI), an NGO representing the families of the victims of police abuse, estimated that domestic security forces had killed 131 persons in the first 11 months of the year. The Center for Legal and Social Studies (CELS) reported higher numbers: 139 killed between January and June in the Greater Buenos Aires area. CORREPI and CELS numbers included individuals killed in confrontations with security forces during the presumed commission of a crime. A total of 24 Federal and Province of Buenos Aires police officers were killed either in the line of duty or intervening in crimes while off duty as security forces continued to confront the surge in violent crime resulting from high unemployment and poverty levels.

On October 21, three juvenile detainees died in a fire in Buenos Aires in the Quilmes police station under suspicious circumstances. The families claimed that police beat the juveniles before the fire. Nine policemen were suspended and under investigation.

Policeman Hector Albarracin confessed to the 2003 killing of Patricia Villalba and testified to the involvement of former Santiago del Estero chief of intelligence Musa Azar and policemen Jorge Pablo Gomez and Francisco Matter in her killing and that of Leyla Bshier Nazar. The trial of these 4 individuals and another 23 defendants charged in the murder of Patricia Villalba was scheduled for March 2005. The killing of Leyla Bshier remained under investigation.

There were no developments in the investigation of the death of Lucas Ricardo Carrizo, a prisoner who was found hanged in his cell in August 2003 in the Ezeiza Penitentiary Complex 1.

The court scheduled March 2005 for the trial of a provincial police chief for the 2002 shooting deaths of demonstrators Dario Santillan and Maximiliano Kosteki. In October, three of nine Federal Police charged in the 2002 beating and drowning of Ezequiel Demonty were found guilty and sentenced to life imprisonment; the other six policemen were sentenced to 3 years in prison.

In early August, a judge in Rosario convicted policemen Esteban Velasquez of homicide for killing Claudio Lepratti during demonstrations in 2001 in Rosario, Santa Fe, and ordered the Province of Santa Fe to compensate Lepratti's family. The Chamber of Deputies' Human Rights Committee initiated an investigation into police actions during that demonstration but did not release any information on its findings.

There were no developments, and none were expected, in the investigation into the 2001 killings of Gaston Galvan and Miguel Burgos. One policeman remained in jail in connection with these killings.

In June, policeman Felipe Gil was acquitted of charges related to the deaths of Jose Zambrano and Pablo Rodriguez in Mendoza Province in 2000. The families appealed the decision citing the judge's alleged mishandling of the case.

On September 2, the 3-judge panel of Federal Oral Court No. 3 in Buenos Aires acquitted all 22 defendants charged in connection with the 1994 terrorist bombing of the Buenos Aires Jewish Community Center (AMIA), in which 85 persons were killed (see Section 2.c.).

Legal efforts continued in a number of European countries, including France, Italy, and Spain, to prosecute those believed responsible for disappearances and killings during the military regime. Judicial authorities planning to prosecute these and other "dirty war" cases traveled to Spain and France to interview witnesses.

b. Disappearance

There were no reports of politically motivated disappearances during the year.

Judicial proceedings and extradition attempts related to killings, disappearances, and torture committed by the 1976-83 military regimes continued (see Sections 1.a. and 1.e.).

The Under Secretariat for Human Rights, which maintained the files of the National Commission on Disappeared Persons, received 9,005 claims for financial compensation from families of those who died or disappeared during the military dictatorship. In October, a judge ordered the Government to pay compensation to a disappeared person's family on grounds that they had been forced into exile.

At the urging of the human rights organization Grandmothers of the Plaza de Mayo, judicial authorities continued to investigate an estimated 250 to 300 cases of kidnapping and illegal adoption by members of the former military regime of children born to detained dissidents. A number of those suspected of crimes linked to illegal adoptions of the children of disappeared persons remained under detention, including Francisco Gomez and his wife and Navy doctor Jorge Luis Magnacco.

Human rights activists continued to pursue "truth trials" intended to correct official records, particularly with regard to the fate of those who disappeared and those born in captivity.

c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Constitution prohibits such practices, and the Criminal Code provides penalties for torture similar to those for homicide; however, some police and prison guards continued to employ torture and brutality. Human rights organizations described police brutality, the occasional use of torture on suspects, and corruption within the prison and police forces. The Government investigated some past reports of police or prison brutality; however, few cases were tried, and even fewer resulted in convictions.

Prison conditions often were poor. Some facilities were old and dilapidated, and many prisons and jails were overcrowded. Higher crime rates and stricter provisions for early release, combined with a slow judicial system, aggravated overcrowding in prisons and police stations. A July report by the Center of Legal and Social Studies on Buenos Aires Province claimed that there were more than 5,400 detainees in police station facilities designed for

3,200 and that the number of minors detained had increased significantly. Juvenile detention centers also were overcrowded, which often resulted in holding minors in police station facilities. The overcrowding contributed both to security problems and to mistreatment of prisoners. On October 21, three juvenile detainees died in a fire in Buenos Aires in the Quilmes police station and on November 13, another minor was found hanged in his cell under suspicious circumstances (see Section 1.a.).

On October 28, the Buenos Aires Provincial Memory Commission released a report detailing the overcrowding in the province's prisons, their substandard conditions, the mistreatment, abuse, and torture of prisoners by prison officers, and the lack of investigation and prosecution of prison officials implicated in abuse and other illegal activities. On November 15, Amnesty International (AI) presented a report to the U.N. Committee on Torture that referred to the Government's "inability and lack of political will to close the circle of impunity that exacerbates human rights abuses such as torture in every corner of the country." As an example, AI described a September 8 incident in Mendoza in which nine prisoners caught attempting to escape were repeatedly beaten, denied medical assistance, and kept naked or in their underclothing for several days.

Impunity for corruption, torture, and brutality by prison guards and officials remained a serious problem. Prisoners who filed torture and mistreatment complaints were targeted for torture or killed. Mar del Plata Batan Penitentiary senior officials and guards were under investigation for allegedly torturing Claudio Benavides and other prisoners in May. Additionally, these officials were charged with threatening to kill the prisoners' families if the pris-

oners filed a complaint against them. The investigating judge stated that he was convinced that this was not an isolated incident but rather reflected ordinary behavior in the penitentiary.

Male and female prisoners were held separately. The law provides that juveniles are to be held separately from adults; however, overcrowding in juvenile facilities often resulted in minors being held in police station facilities, although separated from adult detainees. Despite government regulations prohibiting the practice, reliable reports indicated that pretrial prisoners often were held with convicted prisoners.

The Government permits prison visits by independent human rights observers.

d. Arbitrary Arrest or Detention

The Federal Code of Criminal Procedure limits arrest and detention without warrants to certain restricted situations, for example, criminals caught in the act, fleeing suspects, or overwhelming evidence of a crime being committed, and, while the Government generally observed these prohibitions, provincial police sometimes ignored these restrictions and arbitrarily arrested and detained citizens. In the past, human rights groups reported difficulties in documenting such incidents because victims were reluctant to file complaints for fear of police retaliation or inaction.

In addition to the PFA and Border Police, each province has its own police force. These generally come under a provincial police hierarchy, which in turn responds to a provincial security ministry or secretariat. The effectiveness of and respect for human rights by different forces varied considerably. Corruption was systemic in some forces, and impunity for police abuses was common.

Some of the most common abuses included contract abuses, extortion of and protection for those involved in illegal gambling, prostitution, and auto theft rings, as well as detention and extortion of citizens under the threat of planting evidence to charge them for crimes. Some police also were involved in drug trafficking and kidnapping. Addressing police corruption was difficult, in part, because the suspects intimidated whistleblowing colleagues, judicial officials, and civilian witnesses. Threats and beatings allegedly aimed to intimidate witnesses were common and, in some cases, occurred in connection with killings believed committed by members of security forces or their criminal allies.

Police may detain suspects for up to 10 hours without an arrest warrant if the authorities have a well-founded belief that the suspects have committed, or are about to commit, a crime or if they are unable to determine the identity of a suspect. Human rights groups argued that this provision of law was disregarded to extort money from persons by threatening to charge them with illegal weapons or drug possession.

The law provides for the right of prompt determination of legality, but this right often was not respected in practice.

The law provides for the right to bail, and it was utilized in practice.

Criminal detainees were allowed access to counsel, and public defenders are provided for detainees unable to afford counsel. Lack of resources for the Public Defender's Office resulted in an overly heavy caseload for public defense attorneys. Detainees also were generally allowed prompt access to family members.

The law provides for investigative detention of persons charged with a crime but awaiting or undergoing trial for up to 2 years. This term can be extended to 3 years under certain situations: A particularly complex or serious crime; intentional delays by the defense or if investigations could be hampered by release of the detainee; or if there is serious risk of flight. The slow pace of the justice system often resulted in lengthy detentions beyond the period stipulated by law (see Section 1.e.). If convicted, a prisoner usually received credit for time already served. According to the Federal Bureau for Criminal Policies, approximately 62 percent of inmates in federal prisons had been charged but were awaiting trial or completion of their trials.

e. Denial of Fair Public Trial

The Constitution provides for an independent judiciary; however, while the judiciary is nominally independent and impartial, some judges and judicial personnel were inefficient and, at times, subject to, and apt to exercise, political manipulation. There were credible allegations of efforts by members of security forces and others to intimidate the judiciary and witnesses. The system was hampered by inordinate delays, procedural logjams, changes of judges, inadequate administrative support, and incompetence. Judges have broad discretion as to whether and how to pursue investigations, contributing to a sense that many decisions were arbitrary. Allegations of corruption in provincial courts were more frequent than at the federal level, reflecting strong connections between some governors and judicial powers in their provinces.

The judicial system is divided into federal and provincial courts, each headed by a Supreme Court

with chambers of appeal and section courts below it. The federal courts are divided between the criminal courts and economic courts.

The Council of Magistrates submits a slate of candidates for each federal judicial vacancy to the President, whose selection is subject to Senate approval. The Council also conducts impeachment hearings of judges and administers the federal court system. In October, there were 187 vacant positions and 65 slates awaiting congressional action and 120 pending appointments by the executive.

Investigations of a number of Supreme Court justices by the Chamber of Deputies' Impeachment Committee continued, resulting in the resignation in September of Justice Adolfo Vasquez. This action followed the 2003 impeachment of Justice Eduardo Moline O'Connor and the resignations of Justices Julio Nazareno and Guillermo Lopez. On December 16, the Chamber of Deputies accused Justice Antonio Boggiano of improper performance of duties and sent the case to the Senate, which was expected to consider the case for impeachment early in 2005.

Trials are public, and defendants have the right to legal counsel and to call defense witnesses. A panel of judges decides guilt or innocence. Federal and provincial courts continued the transition to oral trials in criminal cases, replacing the old system of written submissions. Although the 1994 Constitution provides for trial by jury. implementing legislation has not been passed. Lengthy delays in trials were a problem. There is a provision for counsel for indigents; however, in practice, counsel may not always be provided due to a lack of resources. Suspects other than minors are presumed innocent, and

defendants have the right to appeal, as do prosecutors.

There is a military court system. Only military personnel are subject to its jurisdiction.

In August, the Supreme Court upheld the principle of non-applicability of statutes of limitations to war crimes and crimes against humanity in the case of former Chilean intelligence agent Enrique Anacibia Clavel, charged with the 1974 Buenos Aires murder of Chilean General Carlos Prats and his wife.

Judge Claudio Bonadio's investigation into the kidnapping and killing of exiled Montonero guerrillas upon their return to the country from Chile in 1979-80 ended without any indictments. The former Montonero leaders under investigation filed suit against Bonadio for unlawful detention. Judge Rodolfo Canicoba Corral's investigation into cooperation among military and security officials of six countries as part of "Operation Condor" continued.

There were no reports of political prisoners.

f. Arbitrary Interference with Privacy, Family, Home, or Correspondence

The Constitution prohibits such practices, and the Government generally respected these prohibitions in practice.

The law provides the PFA with search, seizure, and entry powers without a court order in cases of danger.

The law provides for legislative oversight of government intelligence activities and prohibits unauthorized interception of private communications; however, in practice, the legislative oversight has yet to be effectively applied.

Section 2 Respect for Civil Liberties, Including:

a. Freedom of Speech and Press

The Constitution provides for freedom of speech and of the press, and the Government generally respected these rights in practice and did not restrict academic freedom.

The independent media were active and expressed a wide variety of views without restriction. A number of independent newspapers and magazines published freely, and all print media were owned privately. Privately owned radio and television stations broadcast freely. The Federal Government owned the Telam wire service, a radio network, and a television station. A few provincial governments also owned broadcast media.

Some sources cited an increased tendency by national and provincial government agencies to withhold advertising to manipulate media coverage. The Inter American Press Association expressed concern regarding legal and other actions taken in August by the Nequen Province government against the Rio Negro newspaper, allegedly in reprisal for the newspaper's editorial policy against revealing sources. Concerns also were raised about the degree to which major print media, subject to severe financial constraints, exercised self-censorship in their criticism of the Government in exchange for favorable government treatment of debts and allocation of official advertising.

The Government did not restrict Internet access.

b. Freedom of Peaceful Assembly and Association

The Constitution provides for freedom of assembly and association, and the Government generally respected these rights in practice. Although most

protests and demonstrations were peaceful, there was an increase in violent demonstrations and confrontations with security forces, resulting in injuries and arrests. Security forces occasionally used rubber bullets but more often used tear gas and water cannons to disperse unruly demonstrators.

Demonstrators were detained in several instances, leading to charges that the Government was criminalizing protests. Agitators reportedly often inserted themselves into otherwise peaceful demonstrations to provoke confrontations with the police. An appeals court upheld the decision that police officer Jose Antonio Aleman should stand trial in the death of Marcelo Luis Cuellar, killed during a November 2003 demonstration in Jujuy Province.

The court set a March 2005 trial date for three Buenos Aires provincial police accused of killing two demonstrators in 2002 (see Section 1.a.).

c. Freedom of Religion

The Constitution provides for freedom of religion, and the Government generally respected this right in practice. The Constitution states that the Federal Government "sustains the apostolic Roman Catholic faith," and the Government provided the Catholic Church with a variety of subsidies. Other religious faiths were practiced freely.

The Secretariat of Worship in the Ministry of Foreign Relations, International Trade, and Worship is responsible for conducting the Government's relations with the Catholic Church, other Christian churches, and other religious organizations. Religious organizations that wish to hold public worship services and obtain tax-exempt status must register with the Secretariat and report periodically to maintain their status.

Acts of discrimination and vandalism against religious minorities, particularly the Jewish and Muslim communities, continued. Combating this and other forms of intolerance was a priority for the National Institute against Discrimination, Xenophobia, and Racism (INADI). The Government continued to support a public dialogue to highlight past discrimination and to encourage improved religious tolerance. There were a number of reports of anti-Semitic acts and of threats against Jewish organizations and individuals during the year. Jewish organizations reported their continued concern but noted that there was no increase in incidents from the previous year. The most frequent incidents included anti-Semitic and pro-Nazi graffiti and posters in cities throughout the country and the proliferation of anti-Semitic publications in bookshops, as well as vandalism in the Israeli Cemetery of Ciudadela, on the outskirts of Buenos Aires.

The Supreme Court's investigation into the 1992 bombing of the Israeli Embassy in Buenos Aires remained at a virtual standstill. On September 2, the 3-judge panel of Federal Oral Court No. 3 acquitted all 22 defendants charged in connection with the 1994 terrorist bombing of the AMIA, in which 85 persons were killed. The panel faulted the investigation of the original judge and prosecutors and called for an investigation into the handling of the investigation and trial. Criminal Judge Rodolfo Canicoba Corral reconfirmed the validity of international arrest warrants against 12 Iranian nationals (including the former Iranian ambassador to Argentina at the time of the attack) and 1 Lebanese national implicated in the attack.

For a more detailed discussion, see the 2004 International Religious Freedom Report.

d. Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation

The Constitution and laws provide for these rights, and the Government generally respected them in practice. The law prohibits forced exile, and it was not used.

The law provides for the granting of asylum or refugee status in accordance with the 1951 U.N. Convention Relating to the Status of Refugees or its 1967 Protocol, and the Government has established a system for providing protection to refugees. In practice, the Government provided protection against refoulement, the return of persons to a country where they feared persecution. The Government granted refugee status or asylum. The Government cooperated with the office of the U.N. High Commissioner for Refugees and other humanitarian organizations in assisting refugees and asylum seekers.

Section 3 Respect for Political Rights: The Right of Citizens to Change Their Government

The Constitution provides citizens with the right to change their government peacefully, and citizens exercised this right in practice through periodic, free, and fair elections held on the basis of universal suffrage. In April 2003, presidential elections were held with no candidate receiving sufficient votes to win outright. Before a runoff could be held, former President Carlos Menem withdrew his candidacy, and, according to constitutional procedures, Nestor Kirchner was declared the winner and assumed the Presidency in May 2003.

The Government continued to pursue anti-corruption measures. Supreme Court justice Adolfo Vasquez, accused of malfeasance in office, resigned in the face of ongoing impeachment proceedings in

the National Legislature (*see* Section 1.e.). The Chamber of Deputies voted to send the impeachment case of another Supreme Court justice facing the same charges to the Senate for determination. Prosecutions of a number of former government officials accused of corruption continued. Further firings of large numbers of federal and provincial police officials also continued in efforts to clean up the security forces.

In March, the Government established a federal trusteeship in the Province of Santiago del Estero following a long accumulation of accusations of corruption and abuses by provincial authorities, culminating in the February 2003 killings of two young women and a subsequent cover-up (see Section 1.a.). Governor Mercedes Aragones de Juarez and her 5-time governor husband Carlos Juarez were under arrest facing numerous charges.

A 2003 National Decree provided regulations to increase public access to government information within the federal executive branch and public institutions. The Senate initiated a television program to transmit sessions live, and the Chamber of Deputies' website provided information on schedules and agendas for committee meetings. The Supreme Court makes public all its decisions, both judicial and administrative.

Surveys conveyed conflicting pictures of the perceived levels of corruption in the country. Transparency International's 2004 Corruption Perceptions Index, based on polls of international businessmen and country analysts, rated the country as beset by widespread corruption. According to a survey conducted by international consulting firm KPMG, opinion leaders, including business executives, academics,

and government bureaucrats, felt that corruption in the country had significantly lessened over the past several years.

The Constitution affirms that political parties are fundamental institutions of the democratic system and calls on political parties to implement measures to increase women's representation in elective office. Decrees provide that one-third of the members of both houses of Congress must be women, a goal achieved through balanced election slates. There were 31 women in the 71-seat Senate and 87 women in the 255-seat Chamber of Deputies. The Minister of Social Development was the only woman in the cabinet. There were two female Supreme Court justices, and women were prominent in other levels of the judiciary.

There were no known indigenous, ethnic, or racial minorities in the national legislature, the cabinet, or the Supreme Court.

Section 4 Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights

A wide variety of domestic and international human rights groups operated without government restriction, investigating and publishing their findings on human rights cases. The Government usually was cooperative, although not always responsive to their views.

Among the most active human rights organizations were the Grandmothers of Plaza de Mayo, the Mothers of Plaza de Mayo Founding Line, the Center for Legal and Social Studies, the Permanent Assembly for Human Rights, Service for Peace and Justice, Coordinator Against Police and Institutional Repression, and New Rights of Man.

Within the Government, the Ministry of Justice and Human Rights' Under Secretariat for Human Rights addresses human rights concerns at a domestic level. The Directorate General of Human Rights of the Ministry of Foreign Relations is responsible for international human rights issues. The Ministry of Foreign Relations and the Ministry of Justice and Human Rights cooperated with international human rights entities.

The Constitution establishes the Office of the Ombudsman (Defensor del Pueblo de la Nacion), an independent and autonomous institution charged with defending and protecting human rights and other rights and interests provided by the Constitution, and with oversight of the exercise of public administration functions. The Ombudsman's office produces an annual report to Congress, which includes reports on human rights, administration of justice, social action, and the status of women, children, and minorities.

Section 5 Discrimination, Societal Abuses, and Trafficking in Persons

The Constitution and law provide for equal treatment for all citizens, and the Government generally enforced this provision in practice. The law provides for prison terms of up to 3 years for discrimination based on race, nationality, ideology, political opinion, sex, economic position, social class, or physical characteristics.

The INADI, which is mandated to identify and combat all forms of intolerance in the country, investigated violations of the anti-discrimination law and carried out research and educational programs to promote social and cultural pluralism and combat discriminatory attitudes.

Women

Domestic violence and sexual harassment against women were recognized as serious societal problems. The Inter American Development Bank estimated that 25 percent of women were victims of violence.

Any person suffering physical or psychological domestic violence by a family member may file a formal complaint with a judge or police station, and the Law on Protection Against Family Violence gives a family court judge the right to prevent the perpetrator of a violent act from entering the victim's home or workplace. Charges may also be brought in criminal court, which may apply corresponding penalties.

Public and private institutions offered prevention programs and provided support and treatment for abused women, but there was little transitory housing. The Buenos Aires municipal government operated a small shelter for battered women and a 24-hour hotline offering support and guidance to victims of violence; however, few other shelters existed.

Nongovernmental organizations (NGOs) working in the area of women's rights stressed that women often did not have a full understanding of their rights or of what actions could be considered punishable offenses. In addition, there was a great disparity between urban centers and rural areas with respect to women's awareness of and access to equal rights.

Reliable statistics of rape were not available. Rape falls under the Law of Crimes Against Sexual Integrity. Marital and acquaintance rape involving force are offenses under the law; however, the need for proof, either in the form of clear physical injury or

the testimony of a witness, often presented problems. The penalties for rape vary from 6 months to 20 years in prison.

Soliciting for prostitution is generally illegal but did occur. Some women were trafficked to the country for prostitution (see Section 5, Trafficking).

Sexual harassment occurred, but few complaints were lodged, likely due to a lack of information on existing legal protections. No federal law expressly prohibits sexual harassment. The city of Buenos Aires and the provinces of Buenos Aires, Jujuy, and Tucuman have anti-harassment legislation.

Women enjoyed equality under the law, including property rights; however, women encountered economic discrimination and occupied a disproportionate number of lower paying jobs. Often women were paid less than men for equivalent work, a practice explicitly prohibited by law. Approximately 70 percent of women employed outside the home worked in non-skilled jobs, although the number of women with university degrees was 7.2 percent higher than men. Women accounted for 57 percent of university enrollment, and the law bans all acts that would hinder the access or continuity of the studies for pregnant or nursing students. Approximately 46 percent of women employed outside the home did not have social security or contribute to pension funds.

The National Council of Women carried out programs to promote equal social, political, and economic opportunities for women. The Special Representative for International Women's Issues, a unit in the Ministry of Foreign Relations, participated in studying domestic law standards so as to adapt them to the rules of international law. That office and the National Council of Women, together with the Minis-

try of Labor and union and business organizations, formed the Tripartite Committee on Equal Opportunity for Men and Women in the Workplace, which sought to foster equal treatment and opportunities for men and women in the job market.

Other active women's rights groups included the Women's Social and Political Institute, the Women's Research and Study Institute, and the Foundation for Women's Equality.

Children

The Government voiced strong commitment to issues of children's rights and welfare, including education and health; however, budgetary restrictions for many programs continued. National, provincial, and local agencies worked with international agencies, including UNICEF, to promote children's welfare.

Education is free, universal, and compulsory for 10 years, beginning at age 5; however, adequate schooling was unavailable in some rural areas. The 2001 census showed that 98 percent of all children of primary school age attended school, with approximately the same percentages for both genders. The average child attended school up to the age of 16.3.

There were numerous federal and provincial health care programs for boys and girls on basis of equal access, although not all children had access to them.

Child abuse and prostitution continued to occur, but there was progress in some areas. In 2003, the Council for the Rights of Girls, Boys, and Adolescents, which operated a hotline and a network of neighborhood defenders offices to assist victims in the city of Buenos Aires, intervened in 38 cases of

reported child commercial sexual exploitation and 2,926 cases involving violence against a child. In conjunction with other agencies and organizations, such as UNICEF, the council also conducted active educational and awareness raising efforts. Prosecutors and police pursued cases of Internet child pornography and sought additional legal tools to confront *such* cybercrime.

Child labor was a problem (see Section 6.d.).

Trafficking in Persons

The law prohibits trafficking in persons for the purpose of prostitution through fraud, intimidation, or coercion, or in the case of minors; however, trafficking occurred. The law also prohibits alien smuggling, indentured servitude, and similar abuses. Other laws, including a December 2003 migration law, also may be used to prosecute crimes associated with trafficking, such as kidnapping, forced labor, use of false documents, and prostitution. Penalties for trafficking ranged from 3 years to 15 years in prison.

Coordination of trafficking detection and anti-trafficking prosecution efforts improved. The Government convened a number of interagency coordination meetings, participated in regional anti-trafficking workshops and conferences, and, late in the year, identified the Federal Office of Victim Assistance, a unit under the Federal Prosecutor's office, as the lead agency for coordinating anti-trafficking. The country's law enforcement officers lacked a clear mandate from political leaders and resources to pursue aggressively domestic and international traffickers; however, the Government made efforts to improve its effectiveness in combating trafficking. Three traffickers were convicted and received sen-

tences of 3 to 4 years' imprisonment; 10 other trafficking-related cases were pending.

The country was primarily a destination for men, women, and children trafficked for sexual exploitation and labor. Most foreign victims were women and children trafficked from Paraguay, Bolivia, and Brazil. Victims within the country were trafficked from rural to urban areas. Bolivians were trafficked into the country for forced labor.

Trafficking victims generally were found in situations of prostitution, but there were also cases of other forms of forced labor, such as work in illegal textile factories. Traffickers may confiscate travel documents, which prevented victims from appealing to authorities for protection. Victims, particularly women and girls in prostitution, may be denied contact with the outside world. Victims were often threatened or beaten.

There were no allegations of federal government official involvement in trafficking, and local police and officials suspected of involvement were investigated and prosecuted.

Although the country lacks a comprehensive nationwide policy of victim assistance, the city of Buenos Aires, in particular, assisted dozens of victims, and police department staffs in outlying areas included psychologists to aid victims and witnesses. Some victims qualified for federal government assistance, but most provincial officials were not trained to identify or help victims of trafficking specifically. The Ministry of Foreign Relations began to train consular officials to assist victims abroad, but no data were yet available on the number of possible victims helped. The Catholic Oblate Sisters assisted

victims, offering such help as emergency shelter and counselling.

Trafficking victims normally were not detained, jailed, or deported, although some who were arrested for prostitution-related crimes may be jailed or deported.

The Government did not have a comprehensive policy to prevent trafficking, but isolated preventive measures were in place. The Government made efforts to improve its effectiveness in combating trafficking, notably in the city of Buenos Aires, where the Government established a network to conduct information campaigns, outreach, and child victim identification. In addition, the Government participated in an International Labor Organization (ILO) project to prevent and eliminate commercial sexual exploitation of children in the border region with Brazil and Paraguay.

Persons with Disabilities

The law prohibits discrimination against persons with disabilities in employment, education, and the provision of other state services and mandates access to buildings for persons with disabilities; however the Government did not effectively enforce these rights in practice.

Laws mandating greater accessibility to buses and trains for persons with disabilities were not enforced fully. The Coordinator Committee for the Defense of Disabled People's Rights, composed of governmental and nongovernmental members, focused on accessibility in urban transportation for persons with disabilities and presented a complaint against the Secretariat of Transportation for non-compliance with existing regulations. No effective action was taken.

NGOs and special interest groups claimed accessibility laws and an employment quota reserving 4 percent of national government jobs for persons with disabilities often were not respected in practice. They noted that the law provided no deadlines or penalties and was not mandatory for the provinces. In October, the Buenos Aires City Legislature passed a law reserving 5 percent of city jobs for persons with disabilities. The law imposes a 5-year deadline for compliance.

Indigenous People

The Constitution recognizes the ethnic and cultural identities of indigenous people and states that Congress shall protect their right to bilingual education, recognize their communities and the communal ownership of their ancestral lands, and allow for their participation in the management of their natural resources; however, in practice, indigenous people did not participate in the management of their lands or natural resources. The National Institute of Indigenous Affairs is the government agency responsible for implementing these provisions.

The principal indigenous groups—the Kollas in Salta and Jujuy, the Mapuches in the Patagonian provinces, and the Wichis and Tobas in the northern provinces—were believed to represent less than 5 percent of the national population. Estimates of the number of indigenous persons varied widely, with the Association of Indigenous Communities estimating between 4 to 5 million, and the last official census indicating 1.75 million.

Poverty rates were higher than average in areas with large indigenous populations. Indigenous people had higher rates of illiteracy, chronic disease, and unemployment. Government efforts to offer bi-

lingual education opportunities to indigenous people continued to be hampered by a lack of trained teachers.

Individuals of indigenous descent from the northern part of the country, as well as from Bolivia, Peru, and other Latin American countries, reportedly were subjected frequently to verbal insults because of their dark skin.

Some communities were involved in land disputes with provincial governments and private companies, particularly over questions of natural resource extraction, pollution, and road construction. In June, a Mapuche family in the Province of Chubut was acquitted on charges of unauthorized appropriation of lands, although the family lost its claim to the land in question. Compania de Tierras Sud Argentino brought the suit before civil and criminal courts. Atilio Curinnaco, a member of the accused family, claimed an ancestral entitlement to the lands.

Section 6 Worker Rights

a. The Right of Association

The Constitution provides for the right to form "free and democratic labor unions, recognized by simple inscription in a special register," and workers exercised this right. With the exception of military personnel, all workers were free to form unions. An estimated 35 percent of the work force was organized. Trade unions were independent of the Government and political parties.

Labor groups not affiliated with the General Confederation of Labor contended that the Professional Associations Law provision for legal recognition of only one union per sector conflicts with ILO Convention 87.

The law prohibits antiunion discrimination and requires employers to reinstate workers illegally dismissed for union-related activities.

b. The Right to Organize and Bargain Collectively

The Constitution provides unions with the right to negotiate collective bargaining agreements and to have recourse to conciliation and arbitration. The Ministry of Labor, Employment, and Social Security ratifies collective bargaining agreements, which cover roughly three-fourths of the formally employed work force. According to the ILO, the ratification process impedes free collective bargaining because the Ministry not only considers whether a collective labor agreement contains clauses violating public order standards but also considers whether the agreement complies with productivity, investment, technology, and vocational training criteria. However, there were no known cases during the year when the Government refused to approve any collective agreements under the above criteria.

The Constitution provides for the right to strike, and workers exercised this right. Numerous small-scale strikes generally protested sector-specific problems.

There are three functioning export processing zones with many others legally registered but not active. The same labor laws apply within these zones as in all other parts of the country.

c. Prohibition of Forced or Compulsory Labor

The law prohibits forced or compulsory labor, including by children; however, there were reports that such practices occurred (see Section 5).

d. Prohibition of Child Labor and Minimum Age for Employment

Child labor was a problem, and the Government continued its effort to develop and implement a national plan of action to eliminate it.

The Law on Labor Contracts sets the minimum age for employment at 14 years, and, in rare cases, the Ministry of Education may authorize a younger child to work as part of a family unit. Children between the ages of 14 and 18 may work in a limited number of job categories and for limited hours if they have completed compulsory schooling, which normally ends at 15. The penalty for employing underage workers ranged from $350 to $1,750 (1,000 to 5,000 pesos) for each child employed.

In 2002, the most recent year for which data was reported, the Ministry of Labor estimated that 7.1 percent of children ages 5 to 14 worked. In June, the National Commission for the Eradication of Child Labor (CONAETI) estimated that up to 1.5 million children, or 23 percent of the child population under the age of 15, worked in some capacity. The rate was believed to be higher in rural areas.

Child labor in urban zones increased following the 2001 economic crisis and included such work as trash recycling, street sales, domestic labor, and food preparation. Children also were involved in prostitution, sex tourism, and drug trafficking, although firm statistics were unavailable (see Section 5).

CONAETI worked with unions and other groups to train rural child labor monitors, and with provincial authorities in the tri-border area to undertake activities to address child sexual exploitation. The program director in Puerto Iguazu had received approximately 60 reports of child sex exploitation and,

at year's end, was working with 15 minor girls and their families to provide counseling and to get the girls back into school.

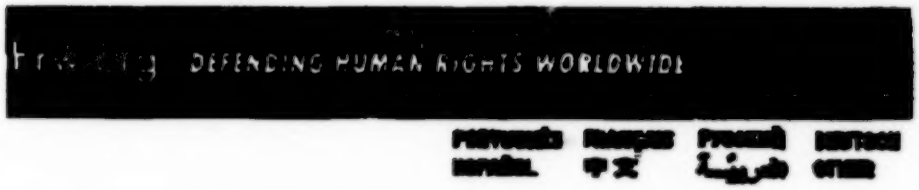
e. Acceptable Conditions of Work

The monthly national minimum wage increased from $105 to $150 (300 to 450 pesos); however, it still did not provide a decent standard of living for a worker and family. Most workers in the formal sector earned significantly more than the minimum wage.

Federal labor law sets standards in the areas of health, safety, and hours. The maximum workday is 8 hours, and the maximum workweek is 48 hours. Overtime payment is required for hours worked in excess of these limits. The law also sets minimums for periods of rest and paid vacation. However, laws governing acceptable conditions of work were not enforced universally, particularly for workers in the informal sector who constituted an estimated 40 percent of the workforce.

The law requires employers to insure their employees against accidents at the workplace and when traveling to and from work. Workers have the right to remove themselves from dangerous or unhealthy work situations without jeopardy to continued employment. However, workers who leave the workplace before it has been proven unsafe risk being fired; in such cases, the worker has the right to judicial appeal, but the process can be very lengthy.

EXHIBIT B



Argentina

World Report 2005: Index

Serious problems continue to beset Argentina's criminal justice system. These include police abuses, prison overcrowding, torture of detainees, and degrading conditions of detention in police lockups. Under strong public pressure to deal more effectively with violent urban crime, the government of President Nestor Kirchner passed laws in 2003 increasing the use of pretrial detention and lengthening jail sentences for violent offenders.

On a positive note, the Kirchner government continues to press for accountability for human rights violations committed during Argentina's period of military rule (1976-1983). At this writing, roughly one hundred former military and police officers had been detained, and several key trials were underway.

Police Abuses

Police frequently fail to observe international norms concerning the use of lethal force and, as a result, the death rate in confrontations with suspects is high. Extrajudicial executions and torture by police are also serious problems, although the true number of extrajudicial executions is hard to gauge. According to official figures, twenty-five people, including four minors, were killed in 2003 during armed clashes involving federal police officers in the city of Bue-

nos Aires. In 2004, victims included fifteen-year-old Hector David Herrera, who was killed on April 16, reportedly shot at close range by members of the federal police.

The March 2004 kidnapping and murder of twenty-three-year-old Axel Blumberg led his father, Juan Carlos Blumberg, to initiate a high-profile public campaign against impunity for violent crimes. In response to demonstrations by thousands of people, the government rushed through laws that lengthened sentences for armed robbery and for arms offenses. The new laws increase the maximum length of cumulative sentences for violent crimes to fifty years, drastically restricts the possibility of provisional release for the accused, and bars convicts from early release. In addition, a bill approved by the Buenos Aires city legislature in September modified the city's misdemeanor code by increasing penalties for many misdemeanors to a maximum of sixty days of detention, a period longer than that contemplated in the Criminal Code for some crimes. The Center for Legal and Social Studies (Centro de Estudios Legales y Sociales, CELS), a nongovernmental human rights group, criticized the Buenos Aires law as "manifestly repressive" and in breach of the Argentine Constitution and international human rights treaties.

Detention Conditions

The Argentine prison system is seriously overstretched, and torture and mistreatment of detainees is widespread. In October 2004, the Committee against Torture of the Provincial Commission of Memory (of Buenos Aires province), after analyzing 3,500 criminal complaints against officials of the Buenos Aires prison system, published dramatic findings indicating that abuse is systemic.

Due to prison overcrowding, 5,441 people were being held awaiting trial in police lockups in the province of Buenos Aires as of July 2004. According to a report by CELS, there were up to ten detainees each crammed into cells measuring 1.8 by 2.5 meters—with no beds, ventilation or natural light—requiring detainees to take turns sleeping on the floor. At this writing, a collective habeas corpus petition lodged by CELS in 2001 on behalf of detainees held in police lockups was still pending before the Supreme Court. In August 2004, Human Rights Watch, the International Commission of Jurists, and the World Organization against Torture co-presented an amicus curiae brief to the court in support of the position taken by CELS.

The detention and mistreatment of juveniles in police stations in the province of Buenos Aires continues to be a serious problem. In a report published in December 2003, CELS revealed that many children are held illegally with adults on police premises but do not appear in official statistics. In October 2004, the press reported that three hundred juveniles were being held illegally in police lockups in the province.

Reproductive Rights

Argentina has taken important steps toward guaranteeing women's right to reproductive health, most notably through the implementation of a national program on "reproductive health and responsible procreation" in 2002. However, women continue to face multiple obstacles in their access to contraception and to information on reproductive health care. Some of these obstacles constitute violations of international human rights standards: denial of access to voluntary tubal ligation; pervasive domestic

violence without effective recourse; deliberate dissemination of misinformation or withholding of information on contraceptive methods in the public health care system; and severely limited access to abortion, even where not punishable by law. These violations are exacerbated for low income women by grossly inadequate services in some areas and a seriously overburdened public health care system.

Accountability for Past Abuses

Following the congressional annulment in August 2003 of the "full stop" and "due obedience" laws—which had obstructed prosecutions of those responsible for human rights abuses committed during military rule—human rights trials continue to advance. The Minister of Defense, José Pampuro, stated in June 2004 that since the current president entered office, ninety-seven former military officers had been detained for past human rights abuses. Among the most high-profile prosecutions are those involving fifteen former agents of the Navy Mechanics School (ESMA), including Alfredo Astiz, and thirty former officers of the First Army Corps. In September 2004, Judge Jorge Urso indicted nineteen former military officials, including ex junta leader Gen. Jorge Videla, for involvement in Operation Condor, a collaborative venture of the military regimes of the Southern Cone countries in the 1970s to arrest, torture, and "disappear" dissidents located in each others' territory.

In March 2004, a federal court in La Plata sentenced Miguel Etchecolatz and Jorge Berges, a former police commissioner and doctor, respectively, to seven years of imprisonment for concealing the identity of the baby daughter of Aida Sanz, who was abducted by the security forces in 1977 when nine

months pregnant and "disappeared." Berges personally had handed the baby over to a civilian couple who raised her under a false name. It was the first time that a court in La Plata has convicted anyone of human rights violations, although up to two thousand people are said to have "disappeared" there during military rule.

A final judicial decision on the constitutionality of the annulment of the "full stop" and "due obedience" laws was still pending at this writing. In October 2003, the Supreme Court referred the case to the Criminal Cassation Panel. The same panel also was due to rule on whether the reopening of the ESMA case violated Argentina's prohibition on double jeopardy.

In August 2004, the Supreme Court rejected an appeal by a former Chilean agent who had argued that the life sentence he received for the 1974 assassination of Chilean army commander Gen. Carlos Prats should be thrown out because the statute of limitations had elapsed. In a landmark decision, the court ruled that, as a crime against humanity, the murder was not subject to a statute of limitations.

In a symbolic event commemorating the twenty-eighth anniversary of the March 24, 1976, military coup, President Kirchner ordered portraits of two leaders of the military juntas that ruled the country until 1983 removed from the walls of the Military College. Kirchner also visited the ESMA and signed an agreement with the city government to turn the building into a "museum of memory."

Freedom of Expression

Although Argentina has a free and vibrant press, progress on bills to extend rights of free expression and access to information remain disappointingly

slow. Press freedom groups have lobbied Congress to adopt legislation to make defamation of public officials punishable only by civil damages, as opposed to criminal sanctions. A bill to this effect introduced into the Senate in October 2002 is still bogged down in the legislative process. Also held up in the Senate is a bill, already approved in the lower house in May 2003, that would give Argentine citizens the right to information held by public bodies.

Journalists in some Argentine provinces face threats and physical attacks for their reporting. The perpetrators of such crimes are rarely prosecuted.

Key International Actors

Recently declassified U.S. government documents reveal the strong support given by former Secretary of State Henry Kissinger to the Argentine military junta in 1976, at a time when the junta was responsible for massive human rights abuses. According to a record of a conversation between Kissinger and Argentina's then-Foreign Minister, Adm. Cesar Augusto Guzzetti, Kissinger told Guzzetti: "[I]f there are things that have to be done, you should do them quickly. But you should get back quickly to normal procedures." The documents show how Kissinger undermined efforts by the U.S. Congress and the U.S. ambassador in Argentina to press the Argentine military to stop the abuses.

Trials continue in Spain of ESMA agents Adolfo Scilingo and Ricardo Miguel Cavallo, the latter of whom was extradited from Mexico in June 2003. Courts in other countries, such as Germany, continue investigating crimes committed during the "dirty war" against their nationals. In November 2003, a Nuremberg court issued international warrants for the arrest of former president Jorge Rafael Videla

and two other former military officials for the murder of two German students in 1976 and 1977. All three suspects were already under house arrest in Argentina on other human rights charges.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

BARBARA BAUMAN et al., Plaintiffs, v. DAIMLERCHRYSLER AG and DOES 1 through 50, inclusive, Defendant.	Case No.: CV 04-194 RMW **SUPPLEMENTAL DECLARATION OF DR. PETER WASKÖNIG IN SUPPORT OF SPECIALLY-APPEARING DEFENDANT DAIMLERCHRYSLER AG'S MOTION TO QUASH SERVICE AND DISMISS FOR LACK OF PERSONAL JURISDICTION** **[FED R. CIV. P. 12(B)(2) & (5)]** Date: June 17, 2005 Time: 9:30 a.m. Courtroom: Six (6) Hon. Ronald M. Whyte

I, Dr. Peter Waskönig, declare as follows:

1. I am Vice President and General Counsel for DaimlerChrysler AG. I have personal knowledge of the facts stated below and those facts are true and correct. In addition, I am familiar with the First Amended Complaint filed in this action, as well as

with Plaintiffs' papers opposing DaimlerChrysler AG's motion to quash service and to dismiss for lack of personal jurisdiction. If called as a witness to do so I could and would testify competently to the following.

2. This declaration is meant to supplement, and not to substitute for, my original declaration in this case, executed on April 13, 2005.

3. DaimlerChrysler Corporation ("DCC") is a Delaware corporation that is a wholly owned indirect subsidiary of DaimlerChrysler AG. The principal place of business of DCC is in Auburn Hills, Michigan. The internal affairs and day-to-day operations of DCC are controlled by DCC's management and board of directors. Mercedes-Benz USA, LLC ("MBUSA") is a Delaware limited liability company with its principal place of business in New Jersey. The internal affairs and day-to-day operations of MBUSA are controlled by MBUSA's management and board of directors.

4. DaimlerChrysler AG was formed in 1998 as a German *Aktiengesellschaft*, organized and existing under the laws of the Federal Republic of Germany.

5. As a foreign issuer, DaimlerChrysler AG files Forms 20-F with the U.S. Securities and Exchange Commission ("SEC") because this is the form required for a foreign company. DaimlerChrysler AG therefore does not file the SEC Form 10-K used by U.S. companies. DaimlerChrysler AG is an "*Aktiengesellschaft*" or German stock company. The caption of every SEC Form 20-F filed by DaimlerChrysler AG since its formation lists DaimlerChrysler AG's principal executive offices at 225 Epplestrasse, 70567, Stuttgart, Germany.

6. DaimlerChrysler AG uses the terms "DaimlerChrysler," the "Daimler-Chrysler Group" or the "Group" in documents including but not limited to its SEC form 20-F to refer to DaimlerChrysler AG and its consolidated subsidiaries, or any one or more of them, as the context may require. News and other sources frequently incorrectly refer to "DaimlerChrysler AG", when in fact the actual legal entity involved is not DaimlerChrysler AG, but rather an affiliated entity or subsidiary, such as DCC.

7. Consequently, for example, a website or annual report indicating that "DaimlerChrysler" has employees or business locations in California would necessarily have to be referring to companies other than DaimlerChrysler AG, because, as I explained in my first declaration in this matter, DaimlerChrysler AG does not have, among other things, offices or employees stationed to work for it in California. The reference on page 9 of Plaintiffs' Opposition Brief to 707 employees in California would therefore, to be true, necessarily refer to employees of subsidiaries of DaimlerChrysler AG, not to DaimlerChrysler AG employees.

8. Contrary to plaintiffs' suggestions, DaimlerChrysler AG does not design or manufacture any product specifically for the California market. Mercedes-Benz vehicles sold in California have the same design, including the same emissions systems, as such Mercedes-Benz vehicles sold elsewhere in the United States. DaimlerChrysler AG designs Mercedes-Benz hydrogen fuel cell vehicles, but again, it has not designed or manufactured any of them specifically for the California market. None of these are California-specific, nor do they differ in design from such hydrogen fuel cell vehicles used elsewhere in

the world, nor are they offered for sale to the public in California.

9. DaimlerChrysler AG is not a member of the California Fuel Cell Partnership. DaimlerChrysler Research and Technology North America, Inc. is a member of the California Fuel Cell Partnership, and is the only company in the DaimlerChrysler Group of companies that is a member.

10. DaimlerChrysler AG does not make submissions to the California Air Resources Board. Such submissions involving Mercedes-Benz vehicles are made by a distinct subsidiary company in the United States.

11. Robert Eaton was co-Chairman of the Board of Management of DaimlerChrysler AG, with Jürgen Schrempp, from DaimlerChrysler AG's formation in 1998 until Mr. Eaton retired in 2000.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 3rd day of June 2005 at Stuttgart, Germany.

s/ Dr. Peter Waskönig
Dr. Peter Waskönig

Pursuant to General Order 45, Section X.B., I hereby attest that I have on file the holograph signature for the conformed signature indicated above in this e-filed document.

s/ Matthew J. Kemner
Matthew J. Kemner

Attorney for Specially-Appearing Defendant
DAIMLERCHRYSLER AG

EXHIBIT 2

 # 46 JM Family Enterprises

Toyota distributor.

See private companies in Automobiles & Trucks.

CEO: Colin Brown
BA Williams College
JD Duke University

100 Jim Moran Boulevard
Deerfield Beach FL 33442
Phone: 954-429-2000
Fax: 954-429-2244
http://www.jmfamily.com

CFO: Mark Walter

2004 Revenues	Revenue Change	Employees	Fiscal Year End
$8.2 bil	**6.5%**	**4,200**	**Dec**

JM Family Enterprises is a diversified automotive company whose principal businesses focus on Toyota vehicle distribution and processing, as well as financing and warranty and insurance services. JM's Southeast Toyota Distributors is the largest franchised distributor in the world, with processing stations in Jacksonville, Florida and Commerce, Georgia. This operation distributes Toyota and Lexus vehicles to Alabama, Florida, Georgia, North Carolina and South Carolina. The company's World Omni Financial Corp. is one of the largest automotive finance companies in the nation. JM Family Enterprises is headquartered in Deerfield Beach, Florida.

Brand Names: Toyota

Vehicle Processing and Distribution

Southeast Toyota Distributors, LLC
Deerfield Beach, Florida
Established 1968

Ranked No.1 in the National Automobile Dealers Association's dealer attitude study, Southeast Toyota Distributors (SET) (www.buyatoyota.com) is the largest, exclusive franchised distributor of Toyota cars, trucks and vans in the world. In 2004, SET sold a record 320,529 vehicles, 281,473 from retail business and 39,056 from fleet business, an increase of 11 percent over 2003. Although southeastern states make up approximately 14 percent of the country's population, SET dealers sell approximately 20 percent, or one of every five Toyotas, sold in the entire country. With more than 165 independent Toyota dealers in the five-state region of Alabama, Florida, Georgia, and North and South Carolina, SET sales out-pace Toyota sales in every other part of the country. 2004 represented Southeast Toyota's 14th year of consecutive retail sales growth!

Southeast Toyota dealers were the first import car dealers to out-sell Volkswagen, "the king of imports," in 1974. Backed by high-quality dealer services from SET and other JM Family companies, SET dealers continue to establish new sales records for Toyota. SET dealers are #1 in total dealer profits, #1 in Scion sales nationally, and represent the #1 region in the country in Toyota Certified used vehicle sales.

SET supports Toyota dealers with regional advertising and promotional campaigns and cooperative programs with dealer associations in many markets. SET is well-known for creating the original "Toyotathon" concept, a popular event that allows

dealers in the same geographic area to combine their marketing power and vehicle inventory.

The company also strives to provide cutting-edge technical support to dealers. In 1996, SET launched dealer Web sites and in 1998 debuted the highly successful buyatoyota.com to allow Toyota customers to order, purchase, lease, virtually "build" and finance vehicles online. In 2004, this combination of online services represented 70 percent of SET dealers' Internet sales. SET retains ownership of buyatoyota.com for the five Southeast states. In 2000, TMS began rolling out buyatoyota.com in other areas of the country.

In 2001, SET introduced the Client Café – an online resource, information exchange and real-time review and feedback tool. Client Café gives SET dealers access to the latest creative advertising concepts, as well as media schedules, flow charts, ranking reports, and budgets for television, cable, newspaper/print and radio.

SET is preparing for the future, working with Toyota to bring customers hybrid technology, like that offered in the best-selling Toyota Prius. The hybrid version of Toyota's Highlander SUV is scheduled to arrive in showrooms in June 2005. The all-new Toyota Tacoma debuted in September and in February 2005, the all-new Avalon was launched. The company also continues to invest in land and facility improvements, people and processes, technology and marketing.

Other divisions help maintain the company's market leadership: Port and Inland Processing, Parts Supply and Distribution, and Parts and Service Support.

FILED
May 01, 2006
Secretary of State

2006 FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# P04043

Entity Name: JM FAMILY ENTERPRISES, INC.

Current Principal Place of Business:
100 JIM MORAN BLVD.
DEERFIELD BEACH, FL 33421702

New Principal Place of Business:

Current Mailing Address:
100 JIM MORAN BLVD.
MAIL DROP JMFDF018 LEGAL DEPT
DEERFIELD BEACH, FL 33442 US

New Mailing Address:

FEI Number: 59-1390794
FEI Number Applied For ( )
FEI Number Not Applicable ( )
Certificate of Status Desires ( )

Name and Address of Current Registered Agent:
CT CORPORATION SYSTEM
1200 S. PINE ISLAND ROAD
PLANTATION, FL 33324 US

Name and Address of New Registered Agent:

The above named entity submits this statement of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE: _____

Electronic Signature of Registered Agent — Date

In accordance with s. 607.193(2)(b), F.S., the corporation did not receive the prior notice. Election Campaign Financing Trust Fund Contribution ( ).

OFFICERS AND DIRECTORS:

Title:	HC	( ) Delete
Name:	MORAN, JAMES M	
Address:	1000 JIM MORAN BLVD	
City-St-Zip:	DEERFIELD BEACH, FL	33442
Title:	COBC	( ) Delete
Name:	MORAN, PATRICIA G	
Address:	1000 JIM MORAN BLVD	
City-St-Zip:	DEERFIELD BEACH, FL	33442
Title:	SVPD	( ) Delete
Name:	MORAN, JANICE M	
Address:	1000 JIM MORAN BLVD	
City-St-Zip:	DEERFIELD BEACH, FL	33442

Title: VPT ( ) Delete
Name: OSSENBECK, PATRICK C
Address: 1000 JIM MORAN BLVD
City-St-Zip: DEERFIELD BEACH, FL 33442

Title: VPS ( ) Delete
Name: WHELAN, JOHN J
Address: 1000 JIM MORAN BLVD
City-St-Zip: DEERFIELD BEACH, FL 33442

Title: PCEO ( ) Delete
Name: BROWN, COLIN W
Address: 1000 JIM MORAN BLVD
City-St-Zip: DEERFIELD BEACH, FL 33442

ADDITIONS/CHANGES TO OFFICERS AND DIRECTORS:

Title: ( ) Change ( ) Addition
Name:
Address:
City-St-Zip:

Title: ( ) Change ( ) Addition
Name:
Address:
City-St-Zip:

Title: ( ) Change ( ) Addition
Name:
Address:
City-St-Zip:

Title:	( ) Change ( ) Addition
Name:	
Address:	
City-St-Zip:	

Title:	VCDC (X) Change ( ) Addition
Name:	WILLIAMS, CAREN SNEAD
Address:	100 JIM MORAN BLVD
City-St-Zip:	DEERFIELD BEACH, FL 33442

Title:	( ) Change ( ) Addition
Name:	
Address:	
City-St-Zip:	

I hereby certify that the information supplied with this filing does not qualify for the for the exemption stated in Chapter 119, Florida Statutes. I further certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 607, Florida Statutes; and that my name appears above, or on an attachment with an address, with all other like empowered.

SIGNATURE: CAREN SNEAD WILLIAMS
VCDC 05/01/2006

Electronic Signature of Signing Officer or Director — Date

EXHIBIT 3

 # 46 Gulf States Toyota

Toyota distributor.

See private companies in Automobiles & Trucks.

7701 Wilshire Place Drive
Houston TX 77040
Phone: 713-580-3300
Fax: 713-580-3332

CEO: Thomas N Hynes
BA Hillsdale College
MBA Stanford University

CFO: Frank Gruen

2004 Revenues	Revenue Change	Employees	Fiscal Year End
$4 bil e	**4.3%**	**3,500**	**Dec**

Headquartered in Houston, Texas, Gulf States Toyota is one of two independent distributors that imports and distributes Toyota vehicles. Gulf States distributes vehicles to 145 dealerships throughout Arkansas, Louisiana, Texas, Oklahoma and Mississippi.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

BARBARA BAUMAN et al., Plaintiffs, v. DAIMLERCHRYSLER AG and DOES 1 through 50, inclusive, Defendant.	Case No. CV 04-194 RMW **DECLARATION OF DR. STEFAN RÜTZEL IN SUPPORT OF SPECIALLY-APPEARING DEFENDANT DAIMLERCHRYSLER AG'S SUPPLEMENTAL BRIEF REGARDING MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION** **[PER COURT'S ORDER OF NOVEMBER 22, 2005]** Date: June 30, 2006 Time: 9:00 a.m. Courtroom: Six (6) Hon. Ronald M. Whyte

I, Dr. Stefan Rützel, hereby declare as follows:

1. I am a member of the Frankfurt bar and I am licensed to practise law in Germany. I am a partner in the law firm of Gleiss Lutz with offices

(*inter alia*) in Frankfurt. I currently head the litigation/dispute resolution department of Gleiss Lutz.

2. I studied law at the Universities of Speyer and Frankfurt in Germany (state exams 1988 and 1992, Dr. jur. 1995) and the University of Georgia School of Law in the United States of America (Master of Laws 1994). I worked as a teaching assistant at the law faculty of the University of Frankfurt in 1988 and 1989. I have published intensively in the area of German and international law on dispute resolution.

3. From 1994 to 2000, I worked with the law firm Pünder, Volhard, Weber & Axster (now Clifford Chance) in Frankfurt where I was made partner in 1999. In 2000, I joined the Frankfurt office of the law firm Bruckhaus Westrick Heller Löber (now Freshfields Bruckhaus Deringer), which I left in 2002 to join the Frankfurt office of Gleiss Lutz. My practice concentrates on litigation/dispute resolution in the national and international field.

4. I am a member of the German Bar Association, the International Bar Association, the German-American Lawyer's Association, and numerous other professional organisations. I serve as Chairman of the Board of Trustees of the Beilstein Institute for the Advancement of the Chemical Sciences, and as a member of the supervisory board of Comtrade AG.

5. The matters referred to in this Declaration are based upon my best personal knowledge and belief, and if called and sworn as a witness, I could and would competently testify as to each of them.

6. I have previously submitted to this Court a declaration dated June 3, 2005. In that declaration, I expressed the opinion that Germany is a suitable alternative forum for the causes of action alleged by

plaintiffs. While I had (and continue to have) no opinion on the merits of plaintiffs' First Amended Complaint or the facts underlying the dispute, I remain of the opinion that a German court could hear and award compensation under German law for the type of claims alleged by the plaintiffs.

7. Since the time of my last declaration, I have reviewed this Court's order tentatively granting DaimlerChrysler AG's motion to dismiss, dated November 22, 2005 (the "Order"). In its Order, the Court expressed concern as to whether, under German law, plaintiffs could argue for equitable tolling of the statute of limitations applicable to their claims (pp. 24-25).

8. I understand that, when U.S. courts refer to "equitable tolling," they are referring to a set of rules that stop a statute of limitations from running in certain circumstances where it would be unjust or inequitable to bar a plaintiff's claim. Germany recognizes principles that are similar to the U.S. doctrine referred to as equitable tolling. For example, under paragraph 1, section 199 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), the limitations period applicable to plaintiffs' claims would not begin running until the end of the year, after plaintiffs became aware (or would have become aware but for gross negligence) of both: (a) the circumstances giving rise to their claims; and (b) the identity of alleged wrongdoer.

9. Additionally, under section 206 BGB, the limitations period can be tolled because plaintiff has been prevented by *force majure* from pursuing his or her rights. German courts have recognized that one form of *force majure* can arise from a breakdown in the justice system such that a fair trial becomes im-

possible (*cf. Bundesgerichtshof*, Federal Court Reporter 126, 87, 97 ff.).

10. Lack of knowledge of the claim delays accrual of a claim up to 30 years. *See* BGB Section 199, Paragraph 2 (imposing a 30-year limit on the amount of time for tolling related to plaintiffs' lack of knowledge of the claim, or gross negligence in failing to obtain such knowledge). Even where the 30-year bar would normally apply, however, there may be circumstances in which *force majure* would extend the limitations period.

11. I have reviewed the declaration that Wolfgang Kaleck submitted in support of plaintiffs' original briefing on May 16, 2005 (which was also cited in the Court's TR). Mr. Kaleck's claim that German courts do not recognize "equitable tolling" exploits a difference in nomenclature. Although German lawyers do not refer to the concepts set forth in authorities such as sections 206 and 199 BGB as "equitable tolling," it is clear that German law is similar in effect to U.S. law. Notably, Mr. Kaleck does not address section 206 or 199 BGB, or otherwise cite any authority supporting his position.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 16th day of June 2006 at Frankfurt, Germany.

s/ Dr. Stefan Rützel
Dr. Stefan Rützel

Pursuant to General Order 45, Section X.B., I hereby attest that I have on file the holograph signature for the conformed signature indicated above in this e-filed document.

s/ Matthew J. Kemner
Matthew J. Kemner

Attorney for Specially-Appearing Defendant
DAIMLERCHRYSLER AG

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

BARBARA BAUMAN et al., Plaintiffs, v. DAIMLERCHRYSLER AG and DOES 1 through 50, inclusive, Defendant.	Case No. CV 04-194 RMW **DECLARATION OF DR. SIEGFRIED SCHWUNG IN SUPPORT OF SPECIALLY-APPEARING DEFENDANT DAIMLERCHRYSLER AG'S SUPPLEMENTAL BRIEF REGARDING MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION** **[PER COURT'S ORDER OF NOVEMBER 22, 2005]** Date: June 30, 2006 Time: 9:00 a.m. Courtroom: Six (6) Hon. Ronald M. Whyte

I, Dr. Siegfried Schwung, declare as follows:

1. I am Vice President and General Counsel, Legal Affairs-Product, for DaimlerChrysler AG. The facts stated below are either based on my personal knowledge, or are based on my collection and review

of company information. In addition, I am familiar with the First Amended Complaint filed in this action, as well as with Plaintiffs' original and supplemental papers opposing DaimlerChrysler AG's motion to dismiss for lack of personal jurisdiction, and this Court's Tentative Ruling of November 22, 2005, regarding DaimlerChrysler AG's motion. If called as a witness to do so I could and would testify competently to the following.

2. As the Court in its prior ruling correctly concluded, DaimlerChrysler AG does not need to sell Mercedes-Benz vehicles in California, either itself or through a direct or indirect subsidiary, for Mercedes-Benz vehicles to be available to California residents. This fact is demonstrated by DaimlerChrysler AG's business model, historical record, and record in many other jurisdictions throughout the world.

3. It is not a part of DaimlerChrysler AG's business model to directly sell Mercedes-Benz vehicles in California. DaimlerChrysler AG is a manufacturer of motor vehicles and related component parts. DaimlerChrysler AG has never been in the business of distributing motor vehicles in California and thus does not have the channels, personnel, expertise, relationships, or mechanisms to distribute vehicles in California.

4. For DaimlerChrysler AG to become a distributor of motor vehicles in California, DaimlerChrysler AG would need to revise its business model, employ a considerable number of individuals to conduct sales, customer support, warranty support, marketing, and distribution activities in California, and also make massive investments in new facilities, relationships, expertise, marketing re-

search, and many other items—both tangible and intangible.

5. The required investments and barriers cannot be minimized. For example, different markets have different shipping requirements, different warranty requirements, different marketing preferences, different cultural issues, different contractual requirements, different dealer issues, and many other differences. Collectively, these items would make DaimlerChrysler AG's business immensely—if not impossibly—complex.

6. DaimlerChrysler AG has consistently undertaken to avoid conducting business directly in any countries outside Germany in order to avoid the potentially significant tax exposure that could result from such conduct. More specifically, doing business in California, or anywhere in the United States generally, could subject DaimlerChrysler AG to taxation in the United States and is thus a further reason why DaimlerChrysler AG would not conduct business directly in California.

7. If MBUSA and other DaimlerChrysler AG subsidiaries were unavailable, distribution would be optimally handled by someone with existing expertise and channels relating to distribution of vehicles in the California market—not by DaimlerChrysler AG itself.

8. Moreover, it is unnecessary for DaimlerChrysler AG to use a subsidiary for Mercedes-Benz vehicles to be available to California residents. The following facts, among others, demonstrate the lack of necessity.

9. First, for many years, DaimlerChrysler AG and/or its predecessors contracted with wholly independent entities that served as distributors for Mer-

cedes-Benz vehicles in California. Until 1958, an independent individual named Mr. Max Hoffman was the sole distributor of Mercedes-Benz vehicles in California. Mr. Hoffman was then replaced by a subsidiary of the wholly independent Studebaker-Packard Corporation, which operated as the distributor for Mercedes-Benz vehicles in California until end of 1964.

10. Second, even very recently, the demand for Mercedes-Benz vehicles has been such that wholly independent entrepreneurs have "filled in" gaps in the distribution chain. To provide one example: until approximately 2001, MBUSA independently had decided against buying, selling, marketing, or distributing the Mercedes-Benz G-Class vehicles in California. Such vehicles were therefore purchased in Germany by a completely independent and unrelated company in New Mexico, known as Europa International, Inc. MBUSA's decision at that time not to buy, sell, or distribute these vehicles led to a distinct market, and there was no need for DaimlerChrysler AG itself to engage in the sales and distribution of the Mercedes-Benz G-Class vehicles in California.

11. Third, in many parts of the world, distributors for Mercedes-Benz vehicles still are wholly independent companies. Non-subsidiaries distribute vehicles in the following countries, among other places: Chile, Croatia, Ireland, Panama, Paraguay, Norway, Bolivia, Honduras, Finland, Peru, and Jamaica. Like MBUSA itself, each of these wholly independent companies has a Distributor Agreement that is negotiated at arms'-length.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 13th day of June 2006 at Sindelfingen, Germany.

s/ Dr. Siegfried Schwung
Dr. Siegfried Schwung

Pursuant to General Order 45, Section X.B., I hereby attest that I have on file the holograph signature for the conformed signature indicated above in this e-filed document.

s/ Matthew J. Kemner
Matthew J. Kemner

Attorney for Specially-Appearing Defendant
DAIMLERCHRYSLER AG

This

GENERAL DISTRIBUTOR AGREEMENT

("this Agreement")

is made as of

May 2, 2005

by and between

DaimlerChrysler AG,
a joint stock company organized and existing under the laws of the Federal Republic of Germany having a place of business at Epplestrasse 225, 70567 Stuttgart, Germany

("DAIMLERCHRYSLER")

and

Mercedes-Benz USA, LLC,
a limited liability company organized and existing under the laws of the State of Delaware with a place of business at One Mercedes Drive, Montvale, NJ 07645

("GENERAL DISTRIBUTOR")

DAIMLERCHRYSLER and GENERAL DISTRIBUTOR are referred to individually as "Party" and collectively as "Parties"

* * *

Article 1 – Appointment of GENERAL DISTRIBUTOR and Rights of Distribution

1.1 Rights of Distribution

DAIMLERCHRYSLER hereby appoints GENERAL DISTRIBUTOR and GENERAL DISTRIBUTOR hereby accepts, subject to the terms and conditions of

this Agreement, to be the exclusive general distributor for the sale and service of Contract Goods (as defined below) in the Contract Territory (as defined below).

1.2 Limitation on Appointment

(1) GENERAL DISTRIBUTOR shall sell Contract Goods only to:

(i) its Authorized Resellers (as defined below);

(ii) body manufacturers for the purpose of mounting bodies; and

(iii) end users of Contract Goods,

whose place of residence or business domicile is within the Contract Territory; provided that Parts (as defined below) may also be sold to resellers and independent repair facilities whose place of business is within the Contract Territory, if they do not directly or indirectly intend to export those Parts.

(2) GENERAL DISTRIBUTOR shall not sell any Contract Goods unless the Contract Goods are purchased under this Agreement or otherwise with DAIMLERCHRYSLER's consent, nor shall GENERAL DISTRIBUTOR acquire or assist others in acquiring Contract Goods bearing any DaimlerChrysler Mark (as defined below) from any source other than DAIMLERCHRYSLER.

1.3 Retained Rights

(1) DAIMLERCHRYSLER may, directly or indirectly, offer, sell and service Contract Goods in the Contract Territory to the following:

(i) diplomatic and consular agencies

(ii) international or supranational authorities or agencies and associated organizations;

(iii) individuals with diplomatic or comparable status;

(iv) governmental or municipal authorities;

(v) fleet purchasers;

(vi) manufacturers of vehicle bodies, if Vehicles or chassis thereof are supplied for the purpose of mounting bodies for resale; and

(vii) any of DAIMLERCHRYSLER's direct or indirect parent companies, affiliates or subsidiaries (each, a "DaimlerChrysler Group Company").

(2) In individual cases, DAIMLERCHRYSLER may sell Contract Goods to customers residing within the Contract Territory at a facility of any DaimlerChrysler Group Company or an exhibition or other organized event. In addition, if a customer in the Contract Territory refuses to purchase from the GENERAL DISTRIBUTOR or its Authorized Reseller and there is a risk of the deal otherwise being lost, DAIMLERCHRYSLER may sell directly to the customer.

(3) If GENERAL DISTRIBUTOR assists in any sale under Clause (1) above or in the event of any sale under Clause (2) above, DAIMLERCHRYSLER may, in its sole discretion, pay to GENERAL DISTRIBUTOR an amount determined by DAIMLERCHRYSLER to be appropriate and in accordance with its then existing policies. However, payment is subject to full settlement of the transaction including full payment to DAIMLERCHRYSLER or the relevant DaimlerChrysler Group Company.

1.4 Related Activities

(1) With respect to financing and leasing, GENERAL DISTRIBUTOR and its Authorized Resellers shall, albeit not exclusively, offer the range of services provided by any DaimlerChrysler Group Company active in the field of financing or leasing.

(2) GENERAL DISTRIBUTOR and its Authorized Resellers shall offer and process service products provided by any DaimlerChrysler Group Company in accordance with the relevant guidelines.

Article 2 – Contract Goods

(1) Contract Goods are:

(i) completely built-up new motor vehicles (including chassis) manufactured by or under license of DAIMLERCHRYSLER or any DaimlerChrysler Group Company, as identified in Annex 1 ("Vehicles") and in the versions intended for the Contract Territory; and

(ii) appertaining new genuine parts, accessories for installation on or attachment to Vehicles, components, aggregates, assemblies, as well as exchange or replacement parts, components, aggregates and assemblies, which are supplied by a DaimlerChrysler Group Company ("Parts").

(2) Successor and supplementary models within existing model series will become Contract Goods upon their official launching in the Contract Territory with the consent of DAIMLERCHRYSLER.

Article 3 – Contract Territory

3.1 Contract Territory

The Contract Territory is as set forth in **Annex 2**, under the heading "Contract Territory".

3.2 Activities Outside of the Contract Territory

GENERAL DISTRIBUTOR and its Authorized Resellers shall not, directly or indirectly, outside of the Contract Territory:

(i) maintain sales or distribution branches or depots for Contract Goods;

(ii) solicit customers for Contract Goods in any manner and, in particular, through the internet; or

(iii) appoint sub-distributors, dealers, outlets or workshops to sell, distribute or service Contract Goods.

Article 4 – Target Agreements

4.1 Sales Period

(1) Prior to each Sales Period, the Parties shall agree upon quantitative and/or qualitative objectives to be reached by GENERAL DISTRIBUTOR and its Authorized Resellers in a Target Agreement. The Target Agreement for the first Sales Period is set forth in **Annex 3**.

(2) "Sales Period" means the calendar year or, for this Agreement's first and last years, the partial calendar year during which this Agreement is in effect.

4.2 Objectives

(1) The quantitative objectives may include, but are not limited to, the following:

(i) a minimum or a specific number of Vehicles to be sold by GENERAL DISTRIBUTOR and its Authorized Resellers to end users in the Contract Territory;

(ii) a minimum or a specific market share in defined vehicle segments in the Contract Territory;

(iii) a minimum or a specific turnover of Parts;

(iv) a specific inventory of Contract Goods (although, in any case, GENERAL DISTRIBUTOR and its Authorized Resellers shall keep a balanced inventory of Contract Goods in quantity and assortment sufficient to meet customer demand in the Contract Territory); and

(v) a specific number of demonstration vehicles (although, in any case, GENERAL DISTRIBUTOR and its Authorized Resellers shall keep in stock such number of demonstration Vehicles appropriate for the volume of business).

(2) The qualitative objectives may include, but are not limited to, the following:

(i) measures which ensure the achievement of Mercedes-Benz Dealership Standards (as defined below) by GENERAL DISTRIBUTOR's Authorized Resellers as well as DAIMLERCHRYSLER's other requirements; and

(ii) the implementation of organizational structures, new facilities or processes.

4.3 Minimum Sales Volume, Minimum Objectives

(1) If, prior to commencement of a Sales Period, the Parties fail to agree upon a Target Agreement, they are deemed to have agreed upon:

(i) a Minimum Sales Volume (as defined hereafter) for that Sales Period; and

(ii) Minimum Objectives for that Sales Period (as defined hereafter).

(2) The Minimum Sales Volume is, for each category of Contract Goods, as the case may be, a number of Vehicles that GENERAL DISTRIBUTOR and its Authorized Resellers must sell, as a minimum, to end-users in the Contract Territory, or a turnover of Parts, that GENERAL DISTRIBUTOR and its Authorized Resellers must make at a minimum.

(3) The Minimum Sales Volume for each category of Vehicles is the number of Vehicles for such category sold during the preceding Sales Period (expressed on the basis of an annual term), adjusted by a percentage decrease or increase equal to the average percentage decrease or increase, as the case may be, of the projected sales (as may be reasonably determined by DAIMLERCHRYSLER) for such category of Vehicles for the Sales Period in the Contract Territory.

(4) The Minimum Sales Volume for each category of Parts is the turnover for such category made during the preceding Sales Period (expressed on the basis of an annual term), adjusted by a percentage decrease or increase equal to the average percentage decrease or increase, as the case may be, of the projected sales (as may be reasonably determined by

DAIMLERCHRYSLER) for such category of Parts for the Sales Period in the Contract Territory.

(5) The Minimum Objectives are all other quantitative objectives that have been agreed upon by the Parties for the preceding Sales Period, adjusted by a percentage decrease or increase equal to the average percentage decrease or increase, as the case may be, of each projected quantitative objective (as may be reasonably determined by DAIMLERCHRYSLER) for the Sales Period in the Contract Territory.

Article 5 – Sales and Service Activities

5.1 Sales and Service Organization

(1) GENERAL DISTRIBUTOR shall directly and/or through Authorized Resellers develop and maintain a sales and service network that in terms of quality and capacity ensures the balanced and thorough distribution of Contract Goods, the supply of the market demand for Contract Goods and expert service that enhances the high-quality image, reputation and acceptability of Contract Goods. GENERAL DISTRIBUTOR shall consult with DAIMLERCHRYSLER prior to establishing or adjusting its sales and service network and shall implement any changes or adjustments requested by DAIMLERCHRYSLER.

(2) "Authorized Resellers" means all persons appointed by GENERAL DISTRIBUTOR in accordance with this Agreement to maintain sales and/or service facilities in the Contract Territory for any Contract Goods.

5.2 Mercedes-Benz Dealership Standards

(1) GENERAL DISTRIBUTOR and its Authorized Resellers shall comply with those standards as may be from time to time implemented and amended or

updated by DAIMLERCHRYSLER that are designated by DAIMLERCHRYSLER as being binding on GENERAL DISTRIBUTOR and/or its Authorized Resellers ("Mercedes-Benz Dealership Standards"). The current Mercedes-Benz Dealership Standards are set forth in **Annex 4**. The implementation or any amendment or update of Mercedes-Benz Dealership Standards requires one year's notice to GENERAL DISTRIBUTOR.

(2) The fulfillment of all Mercedes-Benz Dealership Standards by GENERAL DISTRIBUTOR is a condition precedent for GENERAL DISTRIBUTOR's appointment pursuant to this Agreement, and their continued fulfillment is a condition for this Agreement being upheld. Likewise, the fulfillment of all Mercedes-Benz Dealership Standards by each of GENERAL DISTRIBUTOR's Authorized Resellers must be a condition precedent for the relevant Authorized Reseller's appointment by GENERAL DISTRIBUTOR, and their continued fulfillment must be a condition for the relevant agreement being upheld.

(3) In addition, GENERAL DISTRIBUTOR and its Authorized Resellers shall comply with DAIMLERCHRYSLER's requirements or such other manuals, guidelines or materials as may be from time to time implemented and amended or updated by DAIMLERCHRYSLER.

5.3 Authorized Resellers

(1) Prior to appointing an Authorized Reseller, GENERAL DISTRIBUTOR shall:

(i) provide to DAIMLERCHRYSLER all information relevant to the financial condition, management, ownership, business practices and corporate reputation and to such person's

qualifications and ability to perform as an Authorized Reseller; and

(ii) obtain DAIMLERCHRYSLER's confirmation as to the acceptability of such person. DAIMLERCHRYSLER may, in its sole discretion, reject any such proposed appointment.

(2) GENERAL DISTRIBUTOR shall have a written agreement with each Authorized Reseller and such agreement must be consistent with this Agreement. In particular, such agreement:

(i) must obligate the Authorized Reseller to observe and perform the duties and obligations set forth in this Agreement (in particular the Mercedes-Benz Dealership Standards) as far as any may be applicable to the Authorized Reseller; and

(ii) must not grant to the Authorized Reseller rights that go beyond those which DAIMLERCHRYSLER has granted to GENERAL DISTRIBUTOR, thus restricting or jeopardizing any right or position of DAIMLERCHRYSLER or excluding or impeding the enforcement of any such right or position or damaging or jeopardizing the image of DAIMLERCHRYSLER or any DaimlerChrysler Group Company or the Contract Goods, unless so required by applicable law.

(3) Upon DAIMLERCHRYSLER's request from time to time, GENERAL DISTRIBUTOR shall provide DAIMLERCHRYSLER without delay with a copy of all relevant agreements with any or all of its Authorized Resellers, and all information relevant to the financial condition, management, ownership, business practices and corporate reputation of any or

all of its Authorized Resellers. GENERAL DISTRIBUTOR shall at all times promptly comply with DAIMLERCHRYSLER's instructions to modify or alter all or any of the agreements with its Authorized Resellers in order to comply with Clause 5.2 (2) above, or to enforce any right under those agreements.

(4) GENERAL DISTRIBUTOR shall:

(i) provide its Authorized Resellers with appropriate supervision and training;

(ii) actively monitor the performance by each Authorized Reseller of its agreements with GENERAL DISTRIBUTOR and enforce each Authorized Reseller's obligations under such agreements; and

(iii) use its best efforts to put into place and maintain, and to assist its Authorized Resellers in putting into place and maintaining, effective inventory and retail sale financing programs.

5.4 Facilities

(1) GENERAL DISTRIBUTOR shall directly and/or through its Authorized Resellers maintain offices, sales and service facilities (including vehicle and parts storage and display facilities) sufficient to represent the Contract Goods appropriately in the Contract Territory and enhance the image of the Contract Goods.

(2) Each retail sales outlet, showroom and service facility must:

(i) be at a location approved by DAIMLERCHRYSLER and comply with applicable

Mercedes-Benz Dealership Standards and DAIMLERCHRYSLER's requirements, and

(ii) unless otherwise agreed to by DAIMLERCHRYSLER, be continuously used for the sale or servicing of the Contract Goods during the term of this Agreement.

5.5 Business Systems

(1) GENERAL DISTRIBUTOR and its Authorized Resellers shall maintain accounting, order, inventory control, and warranty claim processing systems and records in a manner acceptable to DAIMLERCHRYSLER. GENERAL DISTRIBUTOR and its Authorized Resellers (through GENERAL DISTRIBUTOR) shall provide to DAIMLERCHRYSLER business management reports at the times and in the form DAIMLERCHRYSLER requests, including but not limited to sales, service, and warranty claims reports, financial reports and operating statements, Parts sales and stock reports as well as customer databases and information. Unless otherwise instructed by DAIMLERCHRYSLER, GENERAL DISTRIBUTOR and its Authorized Resellers shall retain all books and records for at least six years or such longer period as may be required under applicable law.

(2) GENERAL DISTRIBUTOR and its Authorized Resellers shall maintain an electronic data storage, transmission and communication system ("Systems") in the manner and form DAIMLERCHRYSLER recommends from time to time. DAIMLERCHRYSLER recommends GENERAL DISTRIBUTOR and its Authorized Resellers with system equipment, hardware and/or software or may require GENERAL DISTRIBUTOR and its Authorized Resellers to purchase or lease such equipment, hardware and/or software. If DAIMLERCHRYSLER recommends to GENERAL

DISTRIBUTOR and its Authorized Resellers with equipment, hardware or software, GENERAL DISTRIBUTOR and its Authorized Resellers shall:

(i) safeguard such equipment, hardware or software, and will not allow its use for any purpose other than that authorized by DAIMLERCHRYSLER;

(ii) not copy, disassemble, transmit, modify, use or take any action (or allow any other person to do any of these things) that may violate any license for the software (or firmware contained in the hardware) that DAIMLERCHRYSLER may have been granted or which DAIMLERCHRYSLER may grant to GENERAL DISTRIBUTOR and its Authorized Resellers; and

(iii) not transfer or allow the transfer of the equipment, hardware or software to anyone without the consent of DAIMLERCHRYSLER.

(3) GENERAL DISTRIBUTOR and its Authorized Resellers shall observe the rules, terms and conditions relating to the use of Systems and related equipment, hardware and software from time to time implemented by DAIMLERCHRYSLER. All communications, including orders for Contract Goods, claims, and notices submitted through the Systems using GENERAL DISTRIBUTOR's numbers, codes and passwords are valid and legally binding upon GENERAL DISTRIBUTOR, and all such orders, notices or communications are valid and legally binding orders, notices and communications, as the case may be, as if GENERAL DISTRIBUTOR had submitted such order, notice or communication to DAIMLERCHRYSLER in writing, and is deemed to be

"signed" or "sealed" by GENERAL DISTRIBUTOR as if in writing and signed or "sealed" by or on behalf of GENERAL DISTRIBUTOR by hand, for purposes of any law requiring an order for goods or services, notices or communications to be in writing and to be signed or sealed. All uses of identification numbers, codes and passwords for the Systems shall be presumed to be authorized by GENERAL DISTRIBUTOR until GENERAL DISTRIBUTOR notifies DAIMLERCHRYSLER that the number, code or password is compromised. DAIMLERCHRYSLER will cancel and will issue a new password to GENERAL DISTRIBUTOR whenever GENERAL DISTRIBUTOR indicates the password is compromised. DAIMLERCHRYSLER is not liable for any delays or lack of access to any System arising from such cancellation.

5.6 Management Personnel

(1) GENERAL DISTRIBUTOR and its Authorized Resellers shall employ qualified personnel, including a General Manager, a Parts Manager, a Service Manager, and a Sales Manager. These positions may be combined with the prior consent of DAIMLERCHRYSLER. Such employees of GENERAL DISTRIBUTOR and its Authorized Resellers shall not, without the prior consent of DAIMLERCHRYSLER, engage or participate in operating, selling or servicing, as the case may be, of any brand of vehicles other than the Vehicles.

(2) GENERAL DISTRIBUTOR represents and warrants that each individual listed in **Annex 2**, under the heading "Management and Signatory Authority", holds the position indicated and has authority to execute agreements and other documents relating to this Agreement for GENERAL DISTRIBU-

TOR, either jointly or severally, as indicated. GENERAL DISTRIBUTOR authorizes DAIMLERCHRYSLER to rely on any writing signed by these individuals, either jointly or severally, as indicated. GENERAL DISTRIBUTOR shall notify DAIMLERCHRYSLER immediately of the name, position and signatory authority of each replacement or additional authorized person.

(3) GENERAL DISTRIBUTOR represents and warrants that each individual designated as key personnel in **Annex 2**, under the heading "Key Personnel", will participate actively, substantially and continuously in GENERAL DISTRIBUTOR's business operations relating to this Agreement and that GENERAL DISTRIBUTOR will notify DAIMLERCHRYSLER immediately if any key personnel stops participating actively, substantially and continuously in such operations, obtain DAIMLERCHRYSLER's prior approval of any replacement for such key personnel, and appoint a replacement approved by DAIMLERCHRYSLER within reasonable time.

(4) 5.7 Training

GENERAL DISTRIBUTOR shall keep its own personnel and its Authorized Resellers advised of all information received from DAIMLERCHRYSLER. Furthermore, GENERAL DISTRIBUTOR and its Authorized Resellers shall participate in sales, service, parts, technical and business systems training courses DAIMLERCHRYSLER offers or organizes from time to time in the Contract Territory or elsewhere, as DAIMLERCHRYSLER may direct. GENERAL DISTRIBUTOR and its Authorized Resellers shall pay the direct costs of such training as may be assessed by DAIMLERCHRYSLER, and the indirect

costs of such training that DAIMLERCHRYSLER may reasonably incur (including travel expenses) for such training.

Article 6 – Service and Warranty

6.1 Service of Contract Goods

(1) GENERAL DISTRIBUTOR and its Authorized Resellers shall provide service (servicing, maintenance and repair work) for all Contract Goods as well as versions of such goods not intended for sale in the Contract Territory, or whether they are new or used. The preceding sentence shall apply in each case, regardless of whether the goods are in the Contract Territory temporarily or permanently, or where or by whom the goods were acquired. All goods as per the preceding sentence and all respective customers shall be treated with equal care. The service must conform to the applicable Mercedes-Benz Dealership Standards as well as DAIMLERCHRYSLER's requirements and other manuals, guidelines or materials.

(2) GENERAL DISTRIBUTOR shall establish a Service Coordination Center in conformity with the requirements of DAIMLERCHRYSLER, if so required by DAIMLERCHRYSLER. Such Service Coordination Center will be responsible for coordinating service related tasks, implementing service related Mercedes-Benz Dealership Standards as well as DAIMLERCHRYSLER's requirements and such other tasks as may be from time to time assigned by DAIMLERCHRYSLER.

(3) GENERAL DISTRIBUTOR and its Authorized Resellers shall acquire and maintain equipment and tools required for properly servicing the Contract Goods.

6.2 Warranty

(1) GENERAL DISTRIBUTOR and its Authorized Resellers shall at their respective facility locations perform warranty work for Contract Goods as well as versions of such goods not intended for sale in the Contract Territory, or whether they are new or used. The preceding sentence shall apply in each case, regardless of whether the goods are in the Contract Territory temporarily or permanently, or where or by whom the goods were acquired.

(2) Warranty obligations shall follow the warranty terms provided by DAIMLERCHRYSLER for the Contract Territory. If GENERAL DISTRIBUTOR or its Authorized Resellers are obliged by applicable law to provide more extensive warranty, they shall notify DAIMLERCHRYSLER. If GENERAL DISTRIBUTOR or its Authorized Resellers feel that more extensive warranty should be provided in the Contract Territory for other reasons, they shall only provide that warranty with DAIMLERCHRYSLER's prior consent. Warranty obligations for goods purchased outside the Contract Territory shall follow the warranty terms that apply either in the Contract Territory or in such place of purchase outside of the Contract Territory, whichever warranty terms provide the lesser extent of warranty coverage. In all of the cases referred to in this Clause (2), DAIMLERCHRYSLER shall only be liable for the least warranty coverage provided by it.

(3) GENERAL DISTRIBUTOR shall ensure that all warranty claims with respect to the goods are settled properly and without delay. Depending on the technical requirements, warranty work shall consist either of replacement or repair, without any charge

to the customer for labor, parts, freight and customs duty.

GENERAL DISTRIBUTOR and its Authorized Resellers shall use only Parts for warranty work.

(4) DAIMLERCHRYSLER will reimburse GENERAL DISTRIBUTOR for approved warranty service required under this Agreement at the rates and time allowances DAIMLERCHRYSLER establishes from time to time.

(5) GENERAL DISTRIBUTOR shall submit warranty or other claims for reimbursements in accordance with the procedures specified in DAIMLERCHRYSLER's requirements as well as warranty manuals, guidelines and other materials, in effect at the time of such submission. GENERAL DISTRIBUTOR and its Authorized Resellers shall keep Contract Goods and parts thereof that have been replaced in a warranty compound and permit DAIMLERCHRYSLER to examine the removed items in order to determine whether the related warranty claim is justified in accordance with the current procedures between the Parties. DAIMLERCHRYSLER may at any time modify or implement new procedures for approving, verifying, and controlling the quality of warranty service and for warranty claim preparation. GENERAL DISTRIBUTOR and its Authorized Resellers shall allow DAIMLERCHRYSLER access to their respective facilities to observe the performance or administration of warranty service.

(6) The terms of Clauses (1) through (6) apply with equal force to free servicing, goodwill repairs and vehicle recall activities paid for by DAIMLERCHRYSLER in whole or in part.

(7) If GENERAL DISTRIBUTOR or its Authorized Resellers gain knowledge of any defect that may

impair the safety of DAIMLERCHRYSLER's products or that may otherwise be required to be notified by laws applicable to GENERAL DISTRIBUTOR or any DaimlerChrysler Group Company, they shall immediately inform DAIMLERCHRYSLER, irrespective of whether the defect occurred during or after expiration of the warranty period.

6.3 Vehicle Alteration and Equipment Installation

GENERAL DISTRIBUTOR and its Authorized Resellers shall not alter or modify any Contract Good without DAIMLERCHRYSLER's prior approval and then only in the manner DAIMLERCHRYSLER authorizes, unless such alteration or modification has been ordered by an end user and concerns a particular Vehicle purchased by that end user; provided, that such alteration or modification shall not under any circumstances impair the roadworthiness and operating safety of the Vehicle. However, DAIMLERCHRYSLER does not warrant nor guarantee any alteration or modifications to, or the effect of such alterations or modifications on, Contract Goods.

6.4 Parts

GENERAL DISTRIBUTOR and its Authorized Resellers shall only sell or use Parts in repairing and maintaining the Contract Goods.

6.5 Technical Publications

(1) GENERAL DISTRIBUTOR and its Authorized Resellers shall each maintain an organized library of DAIMLERCHRYSLER's technical service publications (including, without limitation, service and diagnostic manuals, service and recall bulletins and applicable labor time schedules) for the Vehicles as maybe from time to time supplied by DAIM-

LERCHRYSLER. GENERAL DISTRIBUTOR and its Authorized Resellers shall at all times utilize all lawful methods to access those of DAIMLERCHRYSLER's databases, electronic media information services and websites that have been opened for them. GENERAL DISTRIBUTOR and its Authorized Resellers shall observe the rules, terms and conditions relating to the use of the Systems from time to time implemented by DAIMLERCHRYSLER,

If GENERAL DISTRIBUTOR or any of its Authorized Resellers undertakes to translate any of the publications into any language other than the language of the publications as provided by DAIMLERCHRYSLER, the copyright therein is owned by DAIMLERCHRYSLER (or other appropriate DaimlerChrysler Group Companies) in its entirety. To the extent GENERAL DISTRIBUTOR and its Authorized Resellers have any interest in that copyright, whether by means of the work of their employees in translating such publications or otherwise, GENERAL DISTRIBUTOR shall (and shall cause its Authorized Resellers to) transfer to DAIMLERCHRYSLER (or other appropriate DaimlerChrysler Group Companies) all their respective rights, title and interest relating to any copyright rights they may acquire in the translation. All those translations must bear a valid copyright notice designating DAIMLERCHRYSLER or the appropriate DaimlerChrysler Group Company as the copyright owner. In the event that DAIMLERCHRYSLER uses that copyright outside the Contract Territory, it will pay to GENERAL DISTRIBUTOR a reasonable portion of the translation costs.

(2) GENERAL DISTRIBUTOR is responsible for ensuring that all publications conform with applicable law. If GENERAL DISTRIBUTOR believes that

any publication may not conform with applicable law, GENERAL DISTRIBUTOR shall notify DAIMLERCHRYSLER of the part that may not so conform and any proposed revisions. GENERAL DISTRIBUTOR shall not make any revisions to any publication without the consent of DAIMLERCHRYSLER.

6.6 Service Commission

(1) GENERAL DISTRIBUTOR is entitled to a service commission, if

(i) another authorized general distributor of Contract Goods or a reseller authorized by such other authorized general distributor supplies a Vehicle to a customer whose place of residence or business is within the Contract Territory,

(ii) customers from outside the Contract Territory themselves or through a third party sell or otherwise pass on a Vehicle into the Contract Territory within six months after delivery, or

(iii) body manufacturers resell into the Contract Territory Vehicle chassis or Vehicles supplied to them with bodies mounted by them,

provided that GENERAL DISTRIBUTOR furnishes proof of the Vehicle having been licensed and kept in operation in the Contract Territory and serviced properly in one of GENERAL DISTRIBUTOR's workshops authorized in accordance with this Agreement and that application for the payment of a service commission is made within a period of twelve months after delivery of the Vehicle to the customer. In the case mentioned under (iii) above, the period for application begins on the date of delivery of the

Vehicle or Vehicle chassis on which the body has been mounted by the body manufacturer.

(2) The service commission is three percent of the German list price (exclusive of VAT) of the basic version of the Vehicle at the time of delivery ex works. DAIMLERCHRYSLER may release itself from this claim by assigning to GENERAL DISTRIBUTOR its claim against the general distributor who sold the Vehicle.

(3) For each Vehicle sold by GENERAL DISTRIBUTOR that leaves the Contract Territory in one of the ways described in Clause (1) above, DAIMLERCHRYSLER may charge on GENERAL DISTRIBUTOR the full difference between the net export price at which the Vehicle is sold and the German list price (exclusive of VAT), except if GENERAL DISTRIBUTOR was not in a position to realize when concluding the deal that the customer's place of residence or business was outside the Contract Territory, or that the customer would pass the Vehicle on into another contract territory within six months from delivery, or if the Vehicle is passed on by central purchasing agencies or their branches, or by body manufacturers, or if the conditions of a tourist transaction are met. In all these cases, DAIMLERCHRYSLER will only charge the amount of service commission pursuant to Clause (2) above.

Furthermore, DAIMLERCHRYSLER may debit the full balance between the net export price and the German list price (exclusive of VAT), if GENERAL DISTRIBUTOR sells a Vehicle to a reseller that is not an authorized member of the DAIMLERCHRYSLER distribution network, except if GENERAL DISTRIBUTOR was not in a position to realize that the Vehicle was to be resold, in which case DAIM-

LERCHRYSLER will only charge the amount of service commission pursuant to Clause (2) above.

(4) Clauses (1) through (4) above do not apply if all general distributors of Contract Goods into whose Contract Territory the Vehicle is being sold or passed on (DAIMLERCHRYSLER, in the case of a sale or passing on to the Federal Republic of Germany) have agreed to the deal in advance.

Article 7 – Promotion, Advertising and Signage

7.1 Promotion and Advertising

(1) GENERAL DISTRIBUTOR and its Authorized Resellers shall actively market Contract Goods (as well as used cars and other services) throughout the Contract Territory through advertising, promotion, and other activities in order to fulfill the potential of the market and to ensure the continued growth, awareness and positive regard for Contract Goods.

(2) GENERAL DISTRIBUTOR's and its Authorized Resellers' marketing strategy and advertising and promotional materials, including their Internet activities, must:

(i) be consistent with the applicable Mercedes-Benz Dealership Standards as well as DAIMLERCHRYSLER's brand representation and identification standards and DAIMLERCHRYSLER's product claims (including attributes and performance); and

(ii) comply with DAIMLERCHRYSLER's directives, standards and processes as may be issued by DAIMLERCHRYSLER from time to time (including any standards from time to time set out in marketing standards manuals and product information bulletins).

(3) Upon DAIMLERCHRYSLER's request, GENERAL DISTRIBUTOR shall submit, at least three months prior to the commencement of each Sales Period, its comprehensive advertising and marketing plan for each Sales Period to DAIMLERCHRYSLER for its review and approval. GENERAL DISTRIBUTOR shall provide DAIMLERCHRYSLER with updates as from time to time requested by DAIMLERCHRYSLER.

(4) GENERAL DISTRIBUTOR and its Authorized Resellers shall neither use, nor allow any person or entity it controls to use, any advertising or promotional materials that may injure any DaimlerChrysler Group Company's or a product's reputation or mislead the public. Upon DAIMLERCHRYSLER's request, GENERAL DISTRIBUTOR and its Authorized Resellers shall immediately stop advertising, promotion or other marketing activities which (in the sole opinion of DAIMLERCHRYSLER) do not comply with DAIMLERCHRYSLER's guidelines or standards, are injurious to DAIMLERCHRYSLER's or any DaimlerChrysler Group Company's business, or are likely to deceive the public, or violate any applicable law or regulation. GENERAL DISTRIBUTOR and its Authorized Resellers are responsible for compliance with applicable laws and rules regulating marketing, advertising and promotional matters.

(5) GENERAL DISTRIBUTOR shall keep DAIMLERCHRYSLER informed of all marketing, advertising and promotional activities implemented by GENERAL DISTRIBUTOR and its Authorized Resellers as well as the results of such activities. GENERAL DISTRIBUTOR agrees that DAIMLERCHRYSLER may provide to other authorized members of the global DaimlerChrysler sales and service network, as an exchange of information, any

marketing, advertising or promotional materials used by GENERAL DISTRIBUTOR or its Authorized Resellers.

(6) GENERAL DISTRIBUTOR and its Authorized Resellers, upon DAIMLERCHRYSLER's request, shall continuously participate in:

(i) any dealer advertising program or association for any of the Vehicles and

(ii) any Parts merchandising programs

from time to time organized by or on behalf of DAIMLERCHRYSLER for all or any part of the Contract Territory.

(7) GENERAL DISTRIBUTOR and its Authorized Resellers shall not distribute or sell merchandise (other than Contract Goods) or promotional materials bearing or using in any way any DaimlerChrysler Mark or otherwise relating in any way to Contract Goods or any DaimlerChrysler Group Company except from a physical dealership or other physical location of GENERAL DISTRIBUTOR or any Authorized Reseller within the Contract Territory. The foregoing prohibits, among other matters, GENERAL DISTRIBUTOR and any Authorized Reseller from distributing or selling such merchandise or promotional materials over or using the internet for such purposes.

7.2 Signage

(1) On terms approved by DAIMLERCHRYSLER and at GENERAL DISTRIBUTOR's or its Authorized Reseller's expense, GENERAL DISTRIBUTOR and its Authorized Resellers shall display at all times appropriate signs and fascia to identify its facility as an authorized facility for Contract Goods. These signs and fascia must comply with the appli-

cable Mercedes-Benz Dealership Standards and DAIMLERCHRYSLER's requirements. DAIMLERCHRYSLER reserves the right to approve or disapprove of each sign's type, design and size.

(2) DAIMLERCHRYSLER may implement a signage program under which DAIMLERCHRYSLER or a DaimlerChrysler Group Company designs, acquires and arranges for the installation of pre-approved signs at GENERAL DISTRIBUTOR's or its Authorized Reseller's facilities under signage lease agreements.

(3) Upon DAIMLERCHRYSLER's request, GENERAL DISTRIBUTOR and its Authorized Resellers shall sell any signage owned by them to DAIMLERCHRYSLER or its designee at a price equal to the residual value of such signage determined by DAIMLERCHRYSLER after allowing for all damage and wear and tear or a nominal price if no residual value exists.

Article 8 – Orders, Pricing and Payment

8.1 Orders

GENERAL DISTRIBUTOR shall place orders for Contract Goods through any System and in accordance with any procedures that DAIMLERCHRYSLER may require or implement from time to time. All orders will be subject to terms and conditions (issued from time to time by DAIMLERCHRYSLER or the DairelerChrysler Group Company selling the Contract Goods) valid at the time of the order. Copies of the current terms and conditions are attached hereto as **Annex 5**. In the event of any conflict, the provisions of this Agreement prevail over the terms and conditions.

8.2 Pricing and Payment

(1) DAIMLERCHRYSLER will notify GENERAL DISTRIBUTOR from time to time of the prices and charges for Contract Goods (including packing, handling and delivery charges included in prices). GENERAL DISTRIBUTOR acknowledges receipt of the current prices for Contract Goods at the date of signature of this Agreement. DAIMLERCHRYSLER may change prices or the charges included in the prices at any time, and make the changes effective immediately.

(2) DAIMLERCHRYSLER grants to GENERAL DISTRIBUTOR discounts and/or bonuses ("Margin") as defined in **Annex 6**. DAIMLERCHRYSLER may change the Margin with one year's notice.

(3) Upon DAIMLERCHRYSLER's request, GENERAL DISTRIBUTOR shall inform DAIMLERCHRYSLER of GENERAL DISTRIBUTOR's prices for the Contract Goods to its Authorized Resellers and retail customers and modify such prices based on consultations with DAIMLERCHRYSLER. GENERAL DISTRIBUTOR and its Authorized Resellers shall comply with any pricing policies as may be from time to time established by DAIMLERCHRYSLER.

(4) GENERAL DISTRIBUTOR must promptly obtain any governmental approvals required to effect any payment to DAIMLERCHRYSLER.

Article 9 – Liability and Indemnification

9.1 Limitation of Liability

(1) Except as otherwise provided in this Agreement, either Party's liability for slight negligence is limited to a breach of duties essential to this Agreement and to typical damage foreseeable at the time

of execution of this Agreement. This limitation does not apply to damage to life, body or health. As far as any damage is covered by insurance, either Party is only liable for costs or losses of the other Party in connection with that insurance.

(2) Nothing in this Agreement, expressed or implied, is intended to give to any person other than the Parties any right, remedy or claim under or by reason of this Agreement. All covenants, stipulations, promises or agreements in this Agreement shall be for the sole and exclusive benefit of the Parties.

(3) Any personal liability of either Party's legal representatives, directors, officers, employees and vicarious agents for slight negligence is excluded.

9.2 Indemnification

(1) GENERAL DISTRIBUTOR shall indemnify Indemnitees from all Indemnifiable Costs relating to any failure by GENERAL DISTRIBUTOR or its Authorized Resellers to observe and perform their respective duties and obligations under this Agreement, including any expenses incurred by DAIMLERCHRYSLER in collecting any amounts due from GENERAL DISTRIBUTOR. GENERAL DISTRIBUTOR shall also indemnify Indemnitees from all Indemnifiable Costs arising from any claims of third parties, including GENERAL DISTRIBUTOR's legal representatives, directors, officers, employees and agents as well as its Authorized Resellers, relating to GENERAL DISTRIBUTOR's performance of, or failure to perform, any duty or obligation under this Agreement and any agreement entered by GENERAL DISTRIBUTOR in connection with this Agreement.

(2) "Indemnitee" means DAIMLERCHRYSLER and each DaimlerChrysler Group Company and their respective legal representatives, directors, officers, employees and agents.

(3) "Indemnifiable Costs" means in relation to any particular matter:

(i) all claims, penalties, fines, judgments or administrative actions made, imposed, rendered or taken against an Indemnitee with respect to that matter, and all settlements to resolve an Indemnitee's alleged liability for that matter;

(ii) all reasonable costs and expenses (including the fees and disbursements of counsel or other advisors) incurred by an Indemnitee in assessing and defending against any alleged liability which would, if successfully asserted, be indemnifiable under clause (i); and

(iii) all losses and direct damages incurred by an Indemnitee by reason of that matter.

9.3 Product Liability

GENERAL DISTRIBUTOR and its Authorized Resellers shall comply with the standard operating procedures from time to time in effect for product liability matters (including, without limitation, "early warnings", claims, lawsuits and arbitration proceedings) relating to Contract Goods.

9.4 Force Majeure

(1) A Party's failure or delay in performing any of its obligations under this Agreement will not be deemed a breach of this Agreement to the extent that such failure or delay is directly due to any Force Majeure Event. The affected Party shall:

(i) promptly notify the other Party of the circumstances and their effect;

(ii) consult with the other Party concerning suitable interim arrangements and exercise due diligence to eliminate or remedy the cause of failure or delay; and

(iii) continue performance as soon as reasonably possible after such cause of failure is removed.

(2) "Force Majeure Event" means any war, riot, insurrection or other civil commotion; any strike, lockout or other labor dispute; any fire, flood or act of God; any labor, material, transportation or utility shortage or curtailment; any governmental order, decree or regulation; or any other similar circumstances beyond the affected Party's reasonable control that it could not avoid by exercising due care. Adverse economic conditions or general financial or operational constraints are not deemed to be a Force Majeure Event.

Article 10 – Designation and DaimlerChrysler Marks

10.1 Designation

GENERAL DISTRIBUTOR has the right and the duty during the term of and for activities in connection with this Agreement to style itself in all documents, notices and advertisements as set forth in **Annex 2**, under the heading "Designation".

10.2 Use of DaimlerChrysler Marks

In the framework of the activities as per Article 10.1 above, GENERAL DISTRIBUTOR and its Authorized Resellers may use the marks of DAIMLERCHRYSLER in compliance with the Trade and

Service Mark Licensing Clauses set forth in **Annex 7**, which are an integral part of this Agreement.

Article 11 – Status and Ownership of GENERAL DISTRIBUTOR

11.1 Status of GENERAL DISTRIBUTOR

(1) GENERAL DISTRIBUTOR and its Authorized Resellers are independent contractors and shall buy and sell Contract Goods under this Agreement as an independent business for their own account. This Agreement does not make GENERAL DISTRIBUTOR or any of its Authorized Resellers a general or special agent, partner, joint venturer or employee of DAIMLERCHRYSLER or any DaimlerChrysler Group Company and does not create any fiduciary relationship or any other relationship of trust or confidence.

(2) GENERAL DISTRIBUTOR and its Authorized Resellers have no authority to make binding obligations for or act on behalf of DAIMLERCHRYSLER or any DaimlerChrysler Group Company. GENERAL DISTRIBUTOR and its Authorized Resellers shall not represent, directly or by implication, to their customers or other third parties that they have such authority.

11.2 GENERAL DISTRIBUTOR's Authority and Ownership

(1) GENERAL DISTRIBUTOR represents and warrants that:

(i) it is duly organized, validly existing and in good standing under applicable laws, and has and will always have full authority and all permits, authorizations and licenses necessary

or advisable to enter into or perform its obligations under this Agreement; and

(ii) the individuals or entities listed in **Annex 2**, under the heading "Ownership Interests", own all of GENERAL DISTRIBUTOR's voting securities or other ownership interests in the percentages shown in **Annex 2**.

(2) GENERAL DISTRIBUTOR shall notify and request the approval of DAIMLERCHRYSLER at least sixty days prior to any proposed change in:

(i) management control of GENERAL DISTRIBUTOR or the legal or beneficial ownership of any of GENERAL DISTRIBUTOR's voting securities or other ownership interests;

(ii) the name or form of GENERAL DISTRIBUTOR's legal entity; or

(iii) the location of GENERAL DISTRIBUTOR's place of business.

(3) No such changes may be made without DAIMLERCHRYSLER's prior consent. GENERAL DISTRIBUTOR shall provide DAIMLERCHRYSLER complete and accurate information as to any voting trusts, shareholders' agreements or other agreements or undertakings affecting the voting of GENERAL DISTRIBUTOR's voting securities or other ownership interests and their beneficial ownership.

(4) If GENERAL DISTRIBUTOR has owners other than natural persons, GENERAL DISTRIBUTOR shall promptly provide DAIMLERCHRYSLER complete and accurate information as to such owners, including their ownership percentages and ultimate controlling parties. If any ultimate controlling party is a publicly-traded corporation, GENERAL DIS-

TRIBUTOR shall also promptly provide any information disseminated to its or such controlling party's shareholders, or disclosed to governmental regulatory agencies, as DAIMLERCHRYSLER may from time to time request.

Article 12 – Financial Structure, Statements and Audit

12.1 Financial Structure and Statements

(1) GENERAL DISTRIBUTOR and its Authorized Resellers shall maintain a sound financial structure with a working capital level and financing capability that satisfy the operating requirements of GENERAL DISTRIBUTOR or its Authorized Resellers, as the case may be. In particular, the working capital level and financing capability must be sufficient for meeting the Minimum Sales Volumes and other targets as per the Target Agreements under this Agreement as well as Mercedes-Benz Dealership Standards and DAIMLERCHRYSLER's requirements, and must be acceptable to DAIMLERCHRYSLER. At no time may GENERAL DISTRIBUTOR's working capital dedicated to its operations related to the Contract Goods be less than the amount specified by DAIMLERCHRYSLER from time to time.

(2) GENERAL DISTRIBUTOR represents and warrants that it will not create, grant or issue any security, charge or rights over or affecting any substantial part or the whole of the business, assets or undertakings of GENERAL DISTRIBUTOR (other than liens in the ordinary course of business) without or in violation of the terms of DAIMLERCHRYSLER's prior consent. GENERAL DISTRIBUTOR shall notify DAIMLERCHRYSLER of its intent to

take any such measure at least sixty days prior to the intended date of that measure.

(3) GENERAL DISTRIBUTOR shall send to DAIMLERCHRYSLER a balance sheet and profit and loss statement for its operations relating to the sale, distribution and service of Contract Goods within ninety days after each fiscal year-end. These statements shall be prepared in accordance with international accounting standards specified by DAIMLERCHRYSLER from time to time and, if requested by DAIMLERCHRYSLER, certified by a public auditor retained by GENERAL DISTRIBUTOR. If requested by DAIMLERCHRYSLER, GENERAL DISTRIBUTOR shall submit an unaudited interim balance sheet and profit and loss statement for each fiscal quarter or such other period as DAIMLERCHRYSLER may specify within thirty days after each quarter or such period, as appropriate. If requested by DAIMLERCHRYSLER, GENERAL DISTRIBUTOR shall provide the same financial reporting for any entity or group of entities that, directly or indirectly, owns 50% or more of GENERAL DISTRIBUTOR's voting securities or other ownership interests.

12.2 Audit

(1) GENERAL DISTRIBUTOR and its Authorized Resellers shall permit DAIMLERCHRYSLER and its representatives during normal office hours to examine and make copies of GENERAL DISTRIBUTOR's and its Authorized Resellers' books and records relating to the purchase, sale, distribution and servicing of Contract Goods (including, warranty services or claims and sales and incentive programs), to verify compliance by GENERAL DISTRIBUTOR and its Authorized Resellers with the terms of this Agree-

ment and the Mercedes-Benz Dealership Standards as well as DAIMLERCHRYSLER's requirements and to assess GENERAL DISTRIBUTOR's and its Authorized Resellers' rating in any customer satisfaction scheme. GENERAL DISTRIBUTOR and its Authorized Resellers shall assist DAIMLERCHRYSLER and its representatives in every way to carry out their tasks, in particular by promptly providing all information and materials and by permitting unhindered access and inspection of the books and records. If duplicating facilities are not available on GENERAL DISTRIBUTOR's or its Authorized Resellers' premises, DAIMLERCHRYSLER or its representatives may remove the books and records from the premises for purposes of making copies.

(2) All payments made by DAIMLERCHRYSLER to GENERAL DISTRIBUTOR or its Authorized Resellers deriving from warranty, sales incentive or other claims are subject to the results of possible audits that may be performed at any time by or at the request of DAIMLERCHRYSLER. Any discrepancies between the information provided by GENERAL DISTRIBUTOR or its Authorized Resellers and the results of any such audit may result in non-payment or chargeback of the claims. DAIMLERCHRYSLER may chargeback GENERAL DISTRIBUTOR on its Parts account or by direct billing for all or any part of the payments deriving from warranty, sales incentive and/or any sums that may be otherwise due and owing to DAIMLERCHRYSLER or other claims that have been paid by DAIMLERCHRYSLER and for which the required evidence is lacking. In addition, DAIMLERCHRYSLER may take other action either under this Agreement or otherwise as it deems appropriate in the event that it reasonably believes that GENERAL DISTRIBUTOR or its Authorized

Resellers have failed to comply with the procedures required to make claims for payment under DAIMLERCHRYSLER's programs, including set-off against any amounts that may be owed by DAIMLERCHRYSLER.

Article 13 – Other Obligations of GENERAL DISTRIBUTOR

13.1 Deal Information

GENERAL DISTRIBUTOR and its Authorized Resellers (through GENERAL DISTRIBUTOR) shall promptly notify DAIMLERCHRYSLER of any possible offer or sale of Contract Goods that they feel, for any reasons whatsoever, unable to make, for DAIMLERCHRYSLER to assist GENERAL DISTRIBUTOR or its Authorized Resellers or any third party in the conclusion of that offer or sale or to make that offer or sale directly.

13.2 Customer Data

GENERAL DISTRIBUTOR and its Authorized Resellers shall collect all customer data suited for identifying existing and potential customers of Contract Goods and for developing marketing concepts and such other customer information as required by DAIMLERCHRYSLER. GENERAL DISTRIBUTOR and its Authorized Resellers shall provide any and all of these data and information to DAIMLERCHRYSLER in a form and manner as requested by DAIMLERCHRYSLER from time to time. Collection of customer data by GENERAL DISTRIBUTOR and its Authorized Resellers shall comply with applicable legal requirements.

13.3 Customer Satisfaction Policies

GENERAL DISTRIBUTOR and its Authorized Resellers, upon DAIMLERCHRYSLER's request, shall

continuously participate in any program and rating scheme with regard to customer satisfaction policies DAIMLERCHRYSLER may institute with regard to all aspects of GENERAL DISTRIBUTOR's and/or its Authorized Resellers' business in the Contract Territory from time to time.

13.4 Other Goods

GENERAL DISTRIBUTOR and its Authorized Resellers shall not, without DAIMLERCHRYSLER's prior consent, directly or indirectly:

(i) manufacture motor vehicles, chassis or parts thereof;

(ii) sell or offer or arrange for sale of any new vehicles of a brand other than the Vehicles except the vehicles specified in **Annex 2**, under the heading "Other Goods";

(iii) sell or offer or arrange for the sale of any parts, including, without limitation, counterfeit parts that bear marks confusingly similar to DaimlerChrysler Marks or that may otherwise mislead the public and/or injure the reputation of any DaimlerChrysler Group Company or any of its products; or

(iv) conclude with third parties agreements on the distribution and/or servicing of motor vehicles or chassis other than the Vehicles, including Vehicles that have been modified technically or visually as well as parts kits offered by third parties for this purpose.

13.5 Assistance and Vehicle Homologation

GENERAL DISTRIBUTOR shall provide such information, cooperation and assistance as may be from time to time requested by DAIMLERCHRYSLER in connection with the business of distribution

of Contract Goods and any vehicle homologation and related issues.

13.6 Compliance with Laws

(1) GENERAL DISTRIBUTOR and its Authorized Resellers shall comply with all laws, decrees, regulations, orders and administrative requirements and policies that apply to the transactions contemplated by this Agreement. GENERAL DISTRIBUTOR shall fully cooperate with DAIMLERCHRYSLER's or any DaimlerChrysler Group Company's efforts to comply with such laws. GENERAL DISTRIBUTOR is solely responsible for complying with the laws, decrees, regulations, orders and administrative requirements and policies that affect its business operations, agents, representatives, employees or workers and its activities contemplated by this Agreement.

(2) If and to the extent that GENERAL DISTRIBUTOR and its Authorized Resellers are prevented by compulsory rules under applicable law to comply with any of the provisions of this Agreement, they are not obliged to comply with these provisions, but the compulsory rules under applicable law apply as if they were included in this Agreement instead of these provisions. GENERAL DISTRIBUTOR promptly shall advise DAIMLERCHRYSLER, in writing, of any instance where it becomes aware of any circumstance where it or its Authorized Resellers cannot comply with any provision of this Agreement due to the requirements of any applicable law.

It is acknowledged by and between the parties that in an effort to promote competition in the sale of the Contract Goods within the Contract Territory, General Distributor shall make all reasonable efforts to limit the amount of new Mercedes-Benz vehicle sold

per year by one Authorized Seller or group of Authorized Resellers to no more than fifteen percent (15%) of the total annual sales for new Mercedes-Benz vehicles by General Distributor in the Contract Territory.

13.7 Execution of Related Agreements

Upon DAIMLERCHRYSLER's request from time to time, GENERAL DISTRIBUTOR and its Authorized Resellers shall execute any agreement relating to use of DaimlerChrysler Marks or Systems or any other matter related to this Agreement in the form from time to time adopted by DAIMLERCHRYSLER; provided, that the terms and conditions of such agreements do not impose an unreasonable burden on GENERAL DISTRIBUTOR or its Authorized Resellers.

Article 14 – Term and Termination

14.1 Term of this Agreement

(1) This Agreement will become effective on the date set out in **Annex 2**, under the heading "Effective Date".

(2) This Agreement will continue in full force and effect for an indefinite period. During that indefinite period, DAIMLERCHRYSLER and GENERAL DISTRIBUTOR may terminate this Agreement, for any reason and without the need for notifying that reason to the other Party, subject to the requirement that such termination shall be effective no less than twelve months from when the notice of termination is delivered to the non-terminating Party.

14.2 Termination with Immediate Effect

(1) Either Party may terminate this Agreement by notice to the other Party with immediate effect for good cause.

(2) Good cause exists, without limitation and as examples only, in the events expressly set forth in this Agreement or if:

(i) a Party is in breach of an obligation under this Agreement despite having been given due warning by the other Party and despite having had sufficient opportunity and time to remedy that breach. No warning is necessary if the violation of material obligations under this Agreement is so grave that the other Party cannot reasonably be expected to continue the contractual relationship any longer;

(ii) a Party is in breach of any representations or warranties expressly set forth in this Agreement;

(iii) a Party makes any fraudulent statement or submission, or any material misrepresentation to the other;

(iv) a Party or any of its officers, employees, agents or representatives has misrepresented any material facts which were relied upon by the other Party in entering into this Agreement and that other Party would not have entered into this Agreement, had it known of that misrepresentation;

(v) voluntary or involuntary proceedings are filed by or against a Party under bankruptcy or insolvency laws or under laws for arrangement, composition, judicial management, liq-

uidation, dissolution, receivership or similar procedures, or either Party seeks or consents to similar relief or remedies without proceedings and, in the case of involuntary proceedings, they are not dismissed within forty-five days;

(vi) a court, arbitral tribunal or administrative agency having jurisdiction declares invalid or refuses to enforce any provision of this Agreement, that provision is a material term of this Agreement to the terminating Party and the Parties cannot reach an agreement on a replacement provision for the void or non-enforceable provision;

(vii) a Force Majeure Event prevents a Party from performing its obligations under this Agreement for more than ninety days and such failure to perform is continuing when notice of termination is given; any existing or future agreement between GENERAL DISTRIBUTOR or its affiliates and DAIMLERCHRYSLER or a DaimlerChrysler Group Company is terminated for reasons equal or similar to those set forth in Clause (2) and (3) which have an impact on the contractual relationship under this Agreement; or

(viii) a Party, for any reason whatsoever, cannot reasonably be expected to continue the contractual relationship until ordinary termination becomes effective.

(3) In addition to the events described in Clause (2) above and anywhere else in this Agreement, DAIMLERCHRYSLER may terminate this Agreement by notice to GENERAL DISTRIBUTOR

with immediate effect upon the occurrence of the following events:

(i) GENERAL DISTRIBUTOR fails to reach a Target Agreement, a Minimum Sales Volume or a Minimum Objective during any Sales Period to an extent that is material, which is the case, for quantitative objectives, if GENERAL DISTRIBUTOR fails to reach the Target Agreement, the Minimum Sales Volume or the Minimum Objective by ten percent or more;

(ii) GENERAL DISTRIBUTOR substantially ends its sales and service activities under this Agreement;

(iii) GENERAL DISTRIBUTOR is merged into another entity, dissolved, expropriated, sequestered or nationalized, or GENERAL DISTRIBUTOR's legal existence is suspended or revoked;

(iv) GENERAL DISTRIBUTOR has not notified and requested the approval of DAIMLERCHRYSLER at least sixty days prior to any proposed change in management control of GENERAL DISTRIBUTOR or the legal or beneficial ownership of any of GENERAL DISTRIBUTOR'S voting securities or other ownership interests, the name or form of GENERAL DISTRIBUTOR's legal entity, or the location of GENERAL DISTRIBUTOR's place of business;

(v) an individual named in **Annex 2**, under the heading "Key Personnel", stops participating actively, substantially and continuously in

GENERAL DISTRIBUTOR's business operations under this Agreement and either a replacement is appointed without DAIMLERCHRYSLER's prior consent or a replacement acceptable to DAIMLERCHRYSLER is not appointed within a reasonable time;

(vi) GENERAL DISTRIBUTOR or its legal and/or beneficial shareholders or owners, or its or their officers or managers, or any individual or entity named in **Annex 2**, under the headings "Management and Signatory Authority", "Key Personnel" and "Ownership Interests", is charged with or convicted of any offense punishable by imprisonment for more than one year, or a crime involving dishonesty, false statement or theft, or engages in or is charged with practices that jeopardize DAIMLERCHRYSLER's good name and goodwill, or acts in a manner which substantially and adversely affects the reputation, distribution and promotion of DAIMLERCHRYSLER's or any DaimlerChrysler Group Company's goods and services;

(vii) GENERAL DISTRIBUTOR's legal and/or beneficial shareholders or owners or its or their officers or managers, or any individual or entity named in Annex 2, under the headings "Management and Signatory Authority", "Key Personnel" and "Ownership Interests", are in repeated disagreement among each other and those disagreements seriously endanger the fulfillment of this Agreement; or

(viii) GENERAL DISTRIBUTOR or any of its Authorized Resellers is in breach of its obliga-

tions under the Trade and Service Mark Licensing Clauses as per **Annex 7**.

14.3 Notification

Either Party shall notify the other Party immediately, if any event entitling the other Party to terminate this Agreement occurs.

14.4 Rights and Obligations on Termination

Upon this Agreement's termination:

(i) GENERAL DISTRIBUTOR or its Authorized Resellers will not have any claims of compensation for loss of clientele against DAIMLERCHRYSLER.

(ii) DAIMLERCHRYSLER will not be obliged to compensate GENERAL DISTRIBUTOR or its Authorized Resellers for any other kind of goodwill created by GENERAL DISTRIBUTOR or its Authorized Resellers.

(iii) DAIMLERCHRYSLER will not be liable to GENERAL DISTRIBUTOR or to its Authorized Resellers for any other damages by reason of termination of this Agreement, including statutory or other indemnities, irrespective whether the damages result from loss of commitments on leases or other obligations, from loss of investment or present or prospective profits, from severance or termination payments to employees or others, from inability to meet obligations, or from any other cause.

(iv) GENERAL DISTRIBUTOR shall immediately stop presenting itself as an authorized general distributor of DAIMLERCHRYSLER. With respect to the use of DaimlerChrysler Marks, the regulations of the Trade and Service Mark Licensing Clauses as per **Annex 7** apply.

(v) GENERAL DISTRIBUTOR's unfilled orders are automatically canceled, unless payment has been made before effectiveness of termination or unless DAIMLERCHRYSLER specifies otherwise. In any case, orders made during the last four months of this Agreement will only be accepted upon payment of the total order volume in advance. If DAIMLERCHRYSLER accepts orders or transacts other business with GENERAL DISTRIBUTOR after termination, the terms and conditions of this Agreement will govern such purchases, but DAIMLERCHRYSLER's acceptance of orders or other business will not renew the Agreement or waive its termination, and DAIMLERCHRYSLER may at any time after effectiveness of termination stop that business with immediate effect. Termination does not modify either Party's payment obligations, except that any loans or other financing granted by DAIMLERCHRYSLER to GENERAL DISTRIBUTOR will be immediately due and payable on termination.

(vi) All amounts owed by either Party to the other will be immediately due and payable without need for notice, other formality or court order.

(vii) GENERAL DISTRIBUTOR and its Authorized Resellers shall return to DAIMLERCHRYSLER, at GENERAL DISTRIBUTOR's expense, all property and other materials or equipment owned by DAIMLERCHRYSLER immediately upon termination of this Agreement. In any case GENERAL DISTRIBUTOR and its Authorized Resellers shall grant access to DAIMLERCHRYSLER or any of DAIMLERCHRYSLER's subcontractors to remove without delay all property and other materials or equipment owned by DAIMLERCHRYSLER.

(viii) DAIMLERCHRYSLER will repurchase from GENERAL DISTRIBUTOR, if so requested by GENERAL DISTRIBUTOR in writing within a reasonable period, however not later than six months after termination of this Agreement, Vehicles delivered by DAIMLERCHRYSLER to GENERAL DISTRIBUTOR, provided that DAIMLERCHRYSLER will not be obliged to repurchase Vehicles from GENERAL DISTRIBUTOR in case DAIMLERCHRYSLER has terminated this Agreement in accordance with Article 14.2. DAIMLERCHRYSLER will only be obliged to repurchase Vehicles that are new, in serial condition, unmodified and as delivered by DAIMLERCHRYSLER, unsold, not registered, undamaged, unused, stored in a state of the art manner, and unequivocally identifiable through the vehicle identification number. The repurchase price for those Vehicles will be their landed cost to GENERAL DISTRIBUTOR (DAIMLERCHRYSLER's invoice price plus unrebated duties, taxes and inland transportation costs) less an adjustment to reflect any damage other diminution in value not normal for new Vehicles being offered for sale at retail at the date of the repurchase. Together with the request to DAIMLERCHRYSLER to repurchase Vehicles, GENERAL DISTRIBUTOR shall provide a complete list of Vehicles to be repurchased. The list shall contain the relevant vehicle identification number, the invoice number, the date of invoice and the amount of invoice for each of the Vehicles to be repurchased. In addition, GENERAL DISTRIBUTOR shall represent and warrant that the Vehicles are in its property and that GENERAL DISTRIBUTOR has all ownership rights without any restrictions or limitations. DAIMLERCHRYSLER shall be entitled to inspect the Vehicles at its discretion. In case of any dispute

on the condition or the price of any Vehicle, DAIMLERCHRYSLER shall be entitled to call an independent expert in order to determine the condition of the Vehicle and, if necessary, any damage or diminution of its value. The expert's fees shall be borne by DAIMLERCHRYSLER and GENERAL DISTRIBUTOR equally.

(ix) GENERAL DISTRIBUTOR shall resell to DAIMLERCHRYSLER, if so requested by DAIMLERCHRYSLER, some or all of the Vehicles delivered by DAIMLERCHRYSLER to GENERAL DISTRIBUTOR, regardless of the circumstances of termination of this Agreement. For such resale, the stipulations of sentences 2, 3, 6, 7, 8 and 9 of Clause (viii) apply.

(x) DAIMLERCHRYSLER shall repurchase from GENERAL DISTRIBUTOR, if so requested by GENERAL DISTRIBUTOR in writing within a reasonable period, however not later than six months after termination of this Agreement, all Parts delivered by DAIMLERCHRYSLER to GENERAL DISTRIBUTOR, provided that DAIMLERCHRYSLER will not be obliged to repurchase Parts from GENERAL DISTRIBUTOR in case DAIMLERCHRYSLER has terminated this Agreement in accordance with Article 14.2. DAIMLERCHRYSLER will only be obliged to repurchase Parts that are unsold, undamaged, unused, in their original packaging and stored in a state of the art manner. The repurchase price for such Parts will be their landed cost to GENERAL DISTRIBUTOR (DAIMLERCHRYSLER's invoice price plus unrebated duties, taxes and inland transportation costs) less 10% of such cost and less an adjustment to reflect any damage or other diminution in value not normal for current Parts being offered for sale at retail. Together with the request to

DAIMLERCHRYSLER to repurchase Parts, GENERAL DISTRIBUTOR shall provide a complete list of Parts to be repurchased. The list shall contain the relevant Parts number, the invoice number, the date of invoice and the amount of invoice for each of the Parts to be repurchased. In addition, GENERAL DISTRIBUTOR shall represent and warrant that the Parts are in its property and that GENERAL DISTRIBUTOR has all ownership rights without any restrictions or limitations. DAIMLERCHRYSLER shall be entitled to inspect the Parts at its discretion. In case of any dispute on the condition or the price of any Part, DAIMLERCHRYSLER shall be entitled to call an independent expert in order to determine the condition of the Part and, if necessary, any damage or diminution of its value. The expert's fees shall be borne by DAIMLERCHRYSLER and GENERAL DISTRIBUTOR equally.

(xi) GENERAL DISTRIBUTOR shall resell to DAIMLERCHRYSLER, if so requested by DAIMLERCHRYSLER, some or all of the Parts delivered by DAIMLERCHRYSLER to GENERAL DISTRIBUTOR, regardless of the circumstances of termination of this Agreement. For such resale, the stipulations of sentences 2, 3, 6, 7, 8 and 9 of Clause (x) apply.

(xii) DAIMLERCHRYSLER may purchase (in which event, GENERAL DISTRIBUTOR shall sell to DAIMLERCHRYSLER) some or all of GENERAL DISTRIBUTOR's special tools and equipment for repair or service of Contract Goods and DAIMLERCHRYSLER signage owned by GENERAL DISTRIBUTOR at the fair market value of such special tools, equipment and signage.

(xiii) GENERAL DISTRIBUTOR and its Authorized Resellers shall remove all registrations or filings of this Agreement and related documents in any public or governmental record and must cancel or assign to DAIMLERCHRYSLER or its designee, as DAIMLERCHRYSLER requests, any governmental licenses, permits or authorizations for importation, sale or servicing of Contract Goods. GENERAL DISTRIBUTOR also grants DAIMLERCHRYSLER an irrevocable power of attorney to take these actions on GENERAL DISTRIBUTOR's behalf and shall do any and all things and acts which may be deemed necessary or appropriate by DAIMLERCHRYSLER in such actions, including executing, or making available to DAIMLERCHRYSLER, as the case may be, any and all relevant documents, instruments, materials or certificates.

(xiv) GENERAL DISTRIBUTOR has no right of retention against any claim of DAIMLERCHRYSLER under this Article 14, unless the claim on which the right of retention is based is uncontested or established by final judgement or arbitral award.

(xv) The following provisions of this Agreement shall survive termination of all or part of this Agreement, and shall continue to be enforceable obligations: Articles 1.2 (2), 1.3 (1), 3.2, 5.3 (2) (ii), 5.3 (3), 5.5 (2) (i), (ii) and (iii), 5.5 (3), 6.2 (8), 6.3, 6.5 (2), 6.5 (3), 6.6 (3), 6.6 (4), 6.6 (5), 7.1 (4), 7.2 (3), 9, 11.1 (2), 12.2, 13.4 (for a period of five years after effectiveness of termination), 14, 15, 16, 1 7, as well as Clauses 1.1, 1.2 and 8 of the Trade and Service Mark Licensing Clauses as per **Annex 7**. The termination of this Agreement will not affect any rights of DAIMLERCHRYSLER or any DaimlerChrysler Group Company under any other agreement between GENERAL DISTRIBUTOR and DAIMLERCHRYS-

LER or any DaimlerChrysler Group Company, except in accordance with the terms of such agreement.

Article 15 – General Provisions

15.1 Prior Agreements, Modification, Registration, Waiver or Assignment

(1) This Agreement constitutes the Parties' entire agreement for selling and servicing Contract Goods in the Contract Territory. It supersedes all prior negotiations, understandings and agreements, written or oral, relating to its subject matter. Any modification or supplement to or extension of this Agreement must be in writing and signed by authorized officers or representatives of both Parties. GENERAL DISTRIBUTOR acknowledges that no representations or statements other than those expressly set forth herein were made by DAIMLERCHRYSLER or any of its officers, employees, agents or representatives, or were relied upon by GENERAL DISTRIBUTOR in entering into this Agreement.

(2) Other than as required by law, GENERAL DISTRIBUTOR will not register or file this Agreement or any related documents in any public or governmental record without the prior consent of DAIMLERCHRYSLER.

(3) When the consent or approval of a Party is required under this Agreement, that consent or approval may be based on such factors, considerations or economic interests deemed by that Party to be relevant, regardless of any prior exercise of that Party's discretion in similar circumstances, and without any duty to justify its exercise of discretion in giving or withholding its consent or approval, or in subjecting its consent or approval to particular conditions.

(4) No waiver of a default or other nonperformance or consent will be valid unless set forth in writing signed by an authorized officer or representative of the Party making the waiver or giving the consent. Any such waiver will be applicable solely to that particular default and will not be a continuing waiver nor will it excuse any later default, and any such consent will be applicable solely to the particular situation for which the consent was granted. No failure or delay by any Party in exercising any right under this Agreement will operate as or be deemed to be a waiver of or limitation on any such right or an implied consent, and no single or partial exercise of any such right will preclude any other or further exercise of that right or the exercise of any other right. Every right and remedy granted by this Agreement is cumulative and in addition to every other right and remedy under this Agreement or available under any applicable addition to every other right and remedy under this Agreement under any applicable law.

(5) Neither Party may assign this Agreement or any of their rights or obligations without or in violation of the terms of the other's prior consent, and unless the consent states otherwise the assigning Party will remain legally obligated, jointly and severally, with its assignee for the performance of this Agreement. In the event of any breach of this Clause by either Party, the other Party may terminate this Agreement in accordance with Article 14-2.

(6) As an exception to Clause (5) above, DAIMLERCHRYSLER may assign this Agreement or any other of its rights or obligations and may delegate its performance to any DaimlerChrysler Group Company and may assign any of its rights to payments due under this Agreement to any entity providing factor-

ing or other financing related services. In the event that DAIMLERCHRYSLER assigns any of its rights or obligations or delegates their performance to any DaimlerChrysler Group Company, DAIMLERCHRYSLER and such DaimlerChrysler Group Company may invoice GENERAL DISTRIBUTOR separately for Contract Goods and related services.

15.2 Confidential Information

(1) GENERAL DISTRIBUTOR and its Authorized Resellers, and their respective officers, employees and agents, shall keep confidential all non-public business or technical information relating to DAIMLERCHRYSLER, any DaimlerChrysler Group Company or any of their respective suppliers or customers of which it becomes aware in connection with this Agreement.

(2) DAIMLERCHRYSLER will treat as confidential all non-public information concerning GENERAL DISTRIBUTOR which is obtained under this Agreement and will not disclose such information to third parties, other than DAIMLERCHRYSLER's professional advisors. This confidentiality obligation, however, will not apply to:

(i) information that is known to DAIMLERCHRYSLER at the time of disclosure;

(ii) information that is or becomes available in the public domain through no fault of DAIMLERCHRYSLER;

(iii) information that is or becomes available to DAIMLERCHRYSLER from any third party who was not in breach of any confidentiality obligation to GENERAL DISTRIBUTOR or of whose breach of any confidentiality obligation

to GENERAL DISTRIBUTOR DAIMLERCHRYSLER was not aware; or

(iv) information that DAIMLERCHRYSLER is required to disclose by law or court or governmental order or request from regulatory authorities.

(3) Should GENERAL DISTRIBUTOR receive a request from any person other than an authorized service center, dealer or general distributor of DAIMLERCHRYSLER for technical information relating to the repair and maintenance of Contract Goods, such request shall be forwarded to DAIMLERCHRYSLER for consideration. No such information may be disclosed without the prior consent of DAIMLERCHRYSLER.

15.3 Counterparts and Photocopies

This Agreement may be executed in counterparts, each of which will be deemed to be an original of this Agreement with the same force and effect. A facsimile or photocopy of a fully executed counterpart of this Agreement, or of a set of identical versions separately executed by the Parties, will be valid evidence of the existence and the terms of this Agreement.

15.4 Interpretation and Discrepancy with Other Documents

(1) In interpreting this Agreement, the following rules of interpretation will apply unless the context requires otherwise:

(i) The singular includes the plural, and conversely.

(ii) A reference to a person includes a company, an unincorporated body or other legal entity, and conversely.

(iii) A reference to a Party to this Agreement or any other agreement or document includes that Party's successors and permitted assigns (if any).

(iv) A reference to this Agreement or any other agreement or document is to that agreement or document as amended, novated, supplemented, varied or replaced from time to time, except to the extent prohibited by this Agreement or by that other agreement or document.

(v) "Includes", "including", "in particular" and similar expressions are intended to signify examples, and not an exclusive listing, in each case as if the words "but not limited to" were part of that expression.

(2) This Agreement was negotiated and concluded in the English language, and the English text of this Agreement will be controlling in all events. Both Parties have had the opportunity to consult with legal counsel in the negotiation of this Agreement, and the fact that DAIMLERCHRYSLER prepared the initial draft of this Agreement shall not be taken into account in interpreting its provisions.

(3) In the event of any discrepancy or conflict between the terms of this Agreement and the terms of any Annex hereto or any document referred to in any Annex hereto, the terms of this Agreement shall prevail.

15.5 Severability

If a court, arbitral tribunal or government authority having jurisdiction declares invalid or unenforceable any provision of this Agreement, this Agreement will be considered divisible as to that provision, and that

provision will be deemed deleted from this Agreement or to be inapplicable, and the remainder of this Agreement will be valid and binding as if that provision were not included herein or as if it were included herein only with respect to those parts of the Contract Territory, if any, where that provision is not invalid or unenforceable.

Article 16 – Notices

(1) All notices, applications, requests, approvals, consents, confirmations and waivers given under or in connection with this Agreement shall be in English, in writing and will be deemed properly given if hand delivered or delivered by:

(i) prepaid registered or certified mail, return receipt requested;

(ii) by commercial courier or messenger service; or

(iii) by facsimile.

(2) Notices will be deemed given on the first to occur of the following:

(i) when actually delivered;

(ii) if sent by facsimile, when the sender receives an electronic confirmation of receipt if promptly followed by a confirmation copy given by another permitted method, unless the recipient acknowledges receipt of the facsimile; or

(iii) if sent by mail, five business days after mailing, unless the declaration is of particular relevance and unless the addressee proves that it has not received the notice.

(3) Notices shall be delivered to the addresses or facsimile numbers (or to any other address or facsimile number that either Party may designate, at any time, to the other by notice given in accordance with this Article 16) as set out in **Annex 2** under the heading "Notices".

Article 17 – Governing Law and Dispute Resolution

(1) This Agreement is made in and will be construed and governed in all respects in accordance with the laws of Germany and without regard to any conflicts of law doctrines or principles of German law.

(2) All disputes, controversies or claims arising from the interpretation, performance or non-performance of this Agreement or any and all transactions related-to this Agreement (including, but not limited to, the validity, scope and enforceability of this provision, or disputes under rights granted pursuant to law) shall be finally and completely resolved in the competent courts at Stuttgart, Germany, which, together with the courts having appellate jurisdiction therefrom, will have exclusive jurisdiction over disputes between the Parties arising under, or relating to this Agreement.

All disputes, controversies or claims arising from the interpretation, performance or non-performance of this Agreement or any and all transactions related to this Agreement (including, but not limited to, the validity, scope and enforceability of this provision, or disputes under rights granted pursuant to law) shall be finally and completely resolved by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce as at present in

force. The appointing authority shall be the Secretary General of the International Court of Arbitration at the International Chamber of Commerce. The place of arbitration shall be Stuttgart, Germany. The language to be used in the arbitral proceedings shall be English.

Article 18 – Signature

This Agreement has been signed by authorized representatives of DAIMLERCHRYSLER and GENERAL DISTRIBUTOR effective as of the Effective Date set forth in **Annex 2** to this Agreement, under the heading "Effective Date".

DaimlerChrysler AG	**Mercedes-Benz USA, LLC**
s/	s/
Harald Shuff, DS	Paul Halata, President & CEO
s/	s/
Detlev Wienpahl, PA	Tracey L. Matura, VP & Legal Dept

Annex 1

Vehicles

Mercedes-Benz Passenger Cars, M-Class, R-Class and G-Class vehicles as well as SLR vehicles.

Annex 2

Contract Specifications

I. Intentionally omitted.

II. Contract Territory

United States, Guam, Puerto Rico and U.S. Virgin Islands.

II. Management and Signatory Authority

NAME	POSITION	JOINT / SEVERAL AUTHORITY
S. Paul Halata	President & Chief Executive Officer	Not applicable
Keith May	Sr. Vice President of Sales Operations	Not applicable
Norbert Litzkow	Vice President of Finhance, Controlling and Information Technically	Not applicable
Klaus Ulkann	Vice President of Customer Service	Not applicable
Michelle Cervantez	Vice President of Marketing	Not applicable
Tracey Matura	General Counsel	Not applicable

III. Key Personnel

S. Paul Halata and Norbert Litzkow.

IV. Designation

Mercedes-Benz USA, LLC

General Distributor of DaimlerChrysler AG for Mercedes-Benz.

V. Ownership Interests

NAME	PERCENT OWNERSHIP
DaimlerChrysler North America Holding Corporation	100%

VI. Other Goods

Maybach and smart.

VII. Effective Date

May 2, 2005.

VIII. Notices

If to
DAIMLERCHRYSLER:
DaimlerChrysler AG
DS, Harald Schuff
HPC 2300
70546 Stuttgart,
Germany

With duplicate copy to:
1)
DaimlerChrysler AG
DSO/S. Klaus Maier
HPC 2200
70546 Stuttgart
Germany
2)
DaimlerChrysler AG
Office of the General Counsel
HPC 0431
70546 Stuttgart
Germany
Attention: International Counsel USA
Facsimile: +49-711-17-94145

If to GENERAL DISTRIBUTOR:
MBUSA
President, Paul Halata
One Mercedes Drive
Montvale, NJ 07645

With duplicate to:
1)
MBUSA
Network Development
SRD, Gregg Goolsby
One Mercedes Drive
Montvale, NJ 07645
2)
MBUSA
Legal Department
Gen Couns, Tracey Matura
One Mercedes Drive
Montvale, NJ 07645

Annex 3

Target Agreement

In accordance with the General Distributor Agreement between DAIMLERCHRYSLER and GENERAL DISTRIBUTOR dated May 2, 2005, GENERAL DISTRIBUTOR undertakes to and agrees with DAIMLERCHRYSLER to achieve yearly targets, which will be agreed on an annual basis in a separate agreement.

Annex 4

Mercedes-Benz Dealership Standards

The parties agree to utilize the current standards of Excellence program as it may be revised from time to time by the Parties.

Annex 5

[Omitted Due to Illegibility of Original Document]

Annex 6

General Principles Governing the Margin

1. **Elements of the Margin**

For each Contract Good invoiced to and fully paid by GENERAL DISTRIBUTOR, DAIMLERCHRYSLER grants to GENERAL DISTRIBUTOR a Margin. The Margin consists of a fixed discount.

2. **Vehicles**

Currently, the fixed discount for Vehicles is as follows:

Intercompany price = sales price to dealers x (100 % - gross margin percentage)

3. **Parts**

The fixed discount for Parts is subject to the discount class ("RG") applicable for the relevant Part, as designated by DAIMLERCHRYSLER. Currently, the following fixed discounts apply for the following discount classes:

General Parts		
Discountgroup	RG 1, 8	48.7%
Discountgroup	RG 4, 5, 9	49.7%
Assemblies		
Discountgroup	RG 2	25.7%
Special Parts		

Discountgroup	RG 3	16%
Accessories		
Discountgroup	RG 3, B 6	0%
Special Tools		
Discountgroup	RG 0	0%

Discounts are based on the list prices of the DaimlerChrysler AG parts price list valid on the day of delivery.

4. Calculation

The discount is calculated as a percentage of the German list price of the relevant Contract Good. The list price is exclusive any charges, such as cost of transportation, transport insurance, taxes, costs of documents and other on-the road charges. In case of Vehicles, the price includes factory fitted options. The discount will be deducted from the German list price of the relevant Contract Good.

Trade and Service Mark Licensing Clauses

1. DaimlerChrysler Marks

1.1 DAIMLERCHRYSLER is the registered proprietor of the following trade and service marks in the Contract Territory ("DaimlerChrysler Marks"):

Mercedes-Benz

1.2 The DaimlerChrysler Marks are and remain the property of DAIMLERCHRYSLER. This property right shall neither be prejudiced by these Trade and Service Mark Licensing Clauses, nor by the General Distributor Agreement, nor by any other agreement between the Parties.

1.3 The DaimlerChrysler Marks are subject of these Trade and Service Mark Licensing Clauses, unless their protection period in the Contract Territory has expired. DAIMLERCHRYSLER does not accept any liability for the validity of the DaimlerChrysler Marks.

2. Right of Use of DaimlerChrysler Marks for the Contract Goods

2.1 DAIMLERCHRYSLER hereby grants to GENERAL DISTRIBUTOR the right of non-exclusive use of the DaimlerChrysler Marks for sales and services in relation to the Contract Goods.

2.2 GENERAL DISTRIBUTOR is obliged to use the DaimlerChrysler Marks on all documents, CI-elements, stationary and advertisements relating to the Contract Goods.

2.3 The use of the DaimlerChrysler Marks by GENERAL DISTRIBUTOR shall be made only in the positions and in the form and manner determined by DAIMLERCHRYSLER. Other marks or designations must not be used by GENERAL DISTRIBUTOR in connection with the Contract Goods.

2.4 If GENERAL DISTRIBUTOR intends to perform other services than those set forth in the General Distributor Agreement, the prior written approval of DAIMLERCHRYSLER for the use of the DaimlerChrysler Marks is required. The granting of such approval shall be in DAIMLERCHRYSLER's sole discretion.

3. Right of Use for Other Purposes

3.1 The use of the DaimlerChrysler Marks in the distribution, presentation and in any type of

advertising practiced by the GENERAL DISTRIBUTOR, such as prospectus, newspaper and magazine advertising or advertising by way of posters and any other outdoor advertising, must be in compliance with DAIMLERCHRYSLER's corporate identity guidelines and is subject to regular consultations with DAIMLERCHRYSLER. Any products with regard to the CI-elements must be procured from suppliers that have been recommended by DAIMLERCHRYSLER.

3.2 The use of the DaimlerChrysler Marks on or in connection with advertising gifts or any other general advertising and publicity, including advertising by expressly authorized business representatives of GENERAL DISTRIBUTOR in the Contractual Territory, requires the prior written approval of DAIMLERCHRYSLER. The granting of such consent shall be in DAIMLERCHRYSLER's sole discretion.

3.3 The lay-out of any stationery, invoices, or other correspondence depicting the DaimlerChrysler Marks must be approved by DAIMLERCHRYSLER.

3.4 GENERAL DISTRIBUTOR is not permitted to use the DaimlerChrysler Marks in its company name.

4. Scope of Use

The use of DaimlerChrysler Marks is restricted to the Contract Territory. In case DAIMLERCHRYSLER permits the distribution of the Contract Goods into countries outside of the Contract Territory, the Parties will conclude a separate prior agreement on the use of

the DaimlerChrysler Marks in the export country.

5. Fees and Defense of DaimlerChrysler Marks

5.1 The consideration for the use of the DaimlerChrysler Marks is included in the purchase prices of the Contract Goods and covered by the joint effort of the Parties to defend the DaimlerChrysler Marks against any violations by third parties in the Contract Territory.

5.2 GENERAL DISTRIBUTOR shall therefore monitor the market with regard to any infringements of the DaimlerChrysler Marks by third parties and will immediately notify DAIMLERCHRYSLER of any unlawful use. The GENERAL DISTRIBUTOR will assist DAIMLERCHRYSLER to the best of its ability in the defense of the DaimlerChrysler Marks. All costs of litigation against infringers of the DaimlerChrysler Marks shall be borne equally by the Parties.

6. Non-Assignment of Rights to Third Parties

6.1 GENERAL DISTRIBUTOR shall not be entitled to assign or transfer to any third parties any of the rights to use any of the DaimlerChrysler Marks.

6.2 As an exception to Clause 6.1 above, GENERAL DISTRIBUTOR shall with the prior written approval of DAIMLERCHRYSLER in each single case authorize its Authorized Resellers to use the DaimlerChrysler Marks in the due course of their business and in accordance with the rules and regulations laid down

in these Trade and Service Mark Licensing Clauses. This right shall be effective during the term of the General Distributor Agreement only and must be revocable at any time.

6.3 GENERAL DISTRIBUTOR shall include in all subcontracts provisions which will grant DAIMLERCHRYSLER full protection as is provided for under these Trade and Service Mark Licensing Clauses and which will entitle DAIMLERCHRYSLER to exercise all rights directly against such third parties to the extent that DAIMLERCHRYSLER deems necessary. Failure of GENERAL DISTRIBUTOR to abide by the above regulations may be construed by DAIMLERCHRYSLER as a gross breach of contract.

7. Termination

7.1 DAIMLERCHRYSLER shall have the right to terminate GENERAL DISTRIBUTOR's right to use the DaimlerChrysler Marks upon serving a written notice without need for any further legal or judicial action:

(a) if any DaimlerChrysler Mark is used by GENERAL DISTRIBUTOR in a manner contrary to these Trade and Service Mark Licensing Clauses and if GENERAL DISTRIBUTOR does not discontinue such unauthorized use within thirty (30) days from receipt of a request from DAIMLERCHRYSLER demanding discontinuation;

(b) if any DaimlerChrysler Mark is used by any Authorized Reseller of GENERAL DISTRIBUTOR in a manner contrary to this Agreement and if GENERAL DIS-

TRIBUTOR does not stop such unauthorized use within thirty (30) days from receipt of a request from DAIMLERCHRYSLER demanding discontinuation; or

(b) if any event occurs that entitles DAIMLERCHRYSLER to terminate the General Distributor Agreement.

7.2 GENERAL DISTRIBUTOR's right to use the DaimlerChrysler Marks shall automatically terminate upon the expiration or termination of the General Distributor Agreement.

8. Obligations upon Termination

8.1 In the event of termination of the GENERAL DISTRIBUTOR'S right to use the DaimlerChrysler Marks for any reason, GENERAL DISTRIBUTOR shall cease to utilize the DaimlerChrysler Marks for any purpose at any time after such termination and shall remove or have removed the DaimlerChrysler Marks immediately from wherever they have been affixed by or on behalf of GENERAL DISTRIBUTOR.

8.2 GENERAL DISTRIBUTOR shall ensure that its Authorized Resellers and agents also adhere to the provisions of Clause 8.1 above.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN 27 2013
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No. 11-965

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Daimler AG is a German public stock company that does not manufacture or sell products, own property, or employ workers in the United States. The Ninth Circuit nevertheless held that Daimler AG is subject to *general* personal jurisdiction in California—and can therefore be sued in the State for alleged human-rights violations committed in Argentina by an Argentine subsidiary against Argentine residents—because it has a different, indirect subsidiary that distributes Daimler AG-manufactured vehicles in California. It is undisputed that Daimler AG and its U.S. subsidiary adhere to all the legal requirements necessary to maintain their separate corporate identities.

The question presented is whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Gregory Grieco, Josefina Nunez, Gabriele Nunez, Miriam Nunez, Silvia Nunez, Emilio Guillermo Pesce, Mirta Haydee Arenas, Graciela Gigena, Guillermo Alberto Gigena, Nuria Gigena, Amelia Schiaffo, Elba Leichner, Anunciacion Spaltro de Belmonte, Hector Ratto, Eduardo Olasiregui, Richardo Martin Hoffman, Eduardo Estiville, Alfredo Manuel Martin, Juan Jose Martin, Jose Barreiro, and Alejandro Daer were plaintiffs-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Daimler AG, formerly known as DaimlerChrysler AG, is an *Aktiengesellschaft* or German public stock company. It has no parent company, and no publicly held company owns 10% or more of its stock.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is published at 644 F.3d 909. Pet. App. 1a. The court of appeals' order denying rehearing and rehearing en banc, along with the opinion of eight judges dissenting from the denial of rehearing en banc, is published at 676 F.3d 774. Pet. App. 134a. An earlier opinion of the court of appeals, which was subsequently withdrawn, is reported at 579 F.3d 1088. Pet. App. 46a. The court of appeals' order granting rehearing and withdrawing its earlier opinion is reported at 603 F.3d 1141. Pet. App. 146a. The relevant opinions of the district court are available at 2007 WL 486389, Pet. App. 80a, and 2005 WL 3157472, Pet. App. 94a.

JURISDICTION

The court of appeals filed its opinion on May 18, 2011, and denied a timely petition for rehearing and rehearing en banc on November 9, 2011. The petition for a writ of certiorari was filed on February 6, 2012, and granted on April 22, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

A corporation is subject to general personal jurisdiction only when its contacts with the forum State are "so continuous and systematic as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (internal quotation marks omitted). Plaintiffs in this case contend, and the Ninth Circuit agreed, that Daimler AG—a German company that owns no property, sells no vehicles, and employs no workers in California—is nevertheless "at home" in California because it has an indirect subsidiary that distributes Daimler AG-manufactured vehicles in the State. Thus, according to Plaintiffs and the Ninth Circuit, Daimler AG can be sued in California for any claim, including claims by foreign plaintiffs for alleged human-rights violations committed in a foreign country by a *different* foreign subsidiary.

The court of appeals' holding defies this Court's personal-jurisdiction jurisprudence and violates Daimler AG's due-process rights. It exposes corporations to personal jurisdiction in any State where they have a subsidiary, distributor, or independent contractor that regularly conducts business—not just for the activities of that third party, but for *any* alleged activities of the corporation or *any* of its subsidiaries *anywhere* in the world. This Court should reject the Ninth Circuit's sweeping conception of general jurisdiction and reaffirm that a corporation is subject to general personal jurisdiction only where it is truly "at home." *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952).

1. Plaintiffs are 22 Argentine residents. They allege that, while employed in Argentina by Mer-

cedes-Benz Argentina (a subsidiary of Daimler AG's predecessor-in-interest), they, or their relatives, were subject to human-rights abuses at the hands of the military junta that ruled Argentina in the 1970s. In 2004, Plaintiffs filed suit against Daimler AG in the Northern District of California under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victims Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note. They also brought claims "under the laws of California . . . and Argentina." J.A. 57a; *see also* J.A. 50a.[1]

Daimler AG is a German *Aktiengesellschaft*, or public stock company, that manufactures Mercedes-Benz vehicles in Germany. Pet. App. 95a. It does not manufacture products, sell products, or employ workers in the United States. *Id.* Nonetheless, Plaintiffs argued that Daimler AG was subject to general personal jurisdiction in California because Mercedes-Benz USA, LLC ("MBUSA")—an indirect subsidiary of Daimler AG that is incorporated in Delaware and has its principal place of business in New Jersey—distributes Daimler AG-manufactured vehicles to dealers in California.[2]

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[1] Although Plaintiffs' ATS and TVPA claims have been extinguished by, respectively, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), their claims under California and Argentina law remain at issue and within the district court's supplemental jurisdiction under 28 U.S.C. § 1367.

[2] Although the named defendant in this case is DaimlerChrysler AG, DaimlerChrysler AG divested most of its ownership interest in Chrysler LLC in 2007 and changed its name to Daimler AG. Daimler AG divested the remainder of its interest in Chrysler LLC in 2009. At the time this lawsuit was filed, MBUSA was wholly owned by DaimlerChrysler North

The relationship between Daimler AG and MBUSA is governed by a General Distributor Agreement. Pursuant to this Agreement, MBUSA acts as an "independent contractor[ ]" that operates an "independent business for [its] own account." J.A. 179a. The Agreement expressly provides that it does *not* make MBUSA "a general or special agent, partner, joint venture or employee of" Daimler AG. Nor does it "create any fiduciary relationship or any other relationship of trust or confidence" between Daimler AG and MBUSA. *Id.* The Agreement is terminable by either party for good cause or with notice, at which point all amounts owed by either party would be immediately due, and Daimler AG would be required to repurchase all vehicles and parts from MBUSA. J.A. 187a–195a.

The Agreement also sets out terms under which MBUSA purchases Mercedes-Benz vehicles from Daimler AG in Germany (where title passes to MBUSA), imports them into the United States, and distributes them to independent dealerships nationwide, including in California. Pet. App. 116a; *see also* J.A. 149a–215a. Under the Agreement, MBUSA retains broad control over its own operations. For example, once title to the vehicles passes to MBUSA, Daimler AG has "no control over the ultimate destination of the products in the United States." Pet. App. 116a. Similarly, MBUSA has discretion not to purchase classes of vehicles from Daimler AG. Until 2001, for example, MBUSA independently decided against buying G-Class vehicles from Daimler AG for

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[Footnote continued from previous page]

America Holding Company, which, in turn, was a subsidiary of DaimlerChrysler AG. Pet. App. 7a.

distribution in the United States. Pet. App. 49a–50a; *see also* J.A. 147a.

Based on these facts, Daimler AG moved to dismiss Plaintiffs' complaint for lack of personal jurisdiction. In response, Plaintiffs argued that *MBUSA* was subject to general personal jurisdiction in California, and that its jurisdictional contacts with the State should be attributed to Daimler AG, giving the district court general personal jurisdiction over Daimler AG for causes of action having no relationship to MBUSA or to California. Pet. App. 82a. In so arguing, Plaintiffs did not dispute that Daimler AG and MBUSA adhere to the requirements of their separate corporate identities. *See* Pet. App. 114a ("Plaintiffs do not seek to demonstrate that MBUSA is an alter ego of [Daimler AG]."). They asserted instead that attribution of MBUSA's jurisdictional contacts was appropriate because MBUSA is Daimler AG's "agent."

2. On November 22, 2005, the district court tentatively granted Daimler AG's motion to dismiss. First, recognizing that Daimler AG is "a German stock company with headquarters located in Stuttgart, Germany" that "is not qualified or authorized to do business in California and does not import, manufacture, sell, service, or warranty cars in California" (Pet. App. 95a), the district court found that Daimler AG did not, by itself, have sufficient contacts with the State of California to confer general jurisdiction. Pet. App. 111a–112a. Plaintiffs did not appeal this finding. *See* Pet. App. 51a n.2.

Second, the district court tentatively concluded that MBUSA's contacts with California should not be attributed to Daimler AG. The court's analysis was based on Ninth Circuit precedent permitting the at-

tribution of a corporate subsidiary's jurisdictional contacts to a parent company if the subsidiary was acting as the parent's "agent"—*i.e.*, if "'the subsidiary was either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself.'" Pet. App. 24a n.13 (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001) (per curiam)) (emphasis omitted). The court found that, in the absence of MBUSA, Daimler AG could have distributed Mercedes-Benz vehicles in the United States through "a wholly independent company," as Daimler AG did for many years before engaging with MBUSA, and as other auto manufacturers have done in the past and continue to do today both in the United States and around the world. Pet. App. 116a–117a; *see also* J.A. 147a ¶ 11. In addition, the court found that Plaintiffs had provided "no evidence whatsoever" that Daimler AG "exercises operational control over MBUSA." Pet. App. 116a. The court therefore concluded that attributing MBUSA's jurisdictional contacts to Daimler AG would likely be improper. Pet. App. 117a.

Third, the district court considered whether exercising general personal jurisdiction over Daimler AG would be constitutionally "unreasonable." The court explained that several factors weighed against the reasonableness of exercising jurisdiction: the burden Daimler AG would face as a German corporation litigating in California; the German government's "express[ion of] concern that this suit may violate its sovereignty rights"; and California's mere "abstract interest in adjudicating" the dispute based on the "general goal of world-wide preservation of human rights." Pet. App. 121a–122a.

Determining that it needed additional information to reach a final decision, the district court ordered discovery and further briefing on two issues: (1) whether MBUSA was Daimler AG's "agent," and (2) whether Argentina and Germany were adequate alternative forums for the dispute. Pet. App. 132a–133a. Following this discovery and additional briefing, the district court reaffirmed its initial conclusion that MBUSA and Daimler AG did not have an agency relationship for jurisdictional purposes. Pet. App. 83a–85a. The district court also ruled that the exercise of jurisdiction would be constitutionally unreasonable because both Argentina and Germany provided adequate alternative forums for the dispute. Pet. App. 85a. Finally, the district court rejected as waived Plaintiffs' "newly-raised arguments" that the court had personal jurisdiction based on Federal Rule of Civil Procedure 4(k)(2) or that the action should be transferred under 28 U.S.C. § 1406. Pet. App. 92a.

The district court entered a final order dismissing the case for lack of personal jurisdiction.

3. The Ninth Circuit initially affirmed in a 2-1 decision, over Judge Reinhardt's dissent. Pet. App. 61a. Relying on then-settled Ninth Circuit precedent, the court of appeals held that MBUSA was not Daimler AG's "agent" for jurisdictional purposes because Plaintiffs had "failed to make a prima facie showing that [Daimler AG] would undertake to perform substantially similar services in the absence of MBUSA" and because Daimler AG did not exercise "pervasive and continual control" over MBUSA. Pet. App. 58a. The court of appeals also affirmed the district court's ruling that Plaintiffs' untimely argument regarding Rule 4(k)(2) and their request for a transfer were waived. Pet. App. 60a–61a.

Nine months later, however, the Ninth Circuit panel granted Plaintiffs' petition for rehearing and vacated its initial opinion. Pet. App. 146a. The court of appeals set the case for reargument, but thereafter canceled the argument and issued a new opinion. Pet. App. 1a. The new opinion, authored by Judge Reinhardt, reached the opposite conclusion and held that Daimler AG was subject to general personal jurisdiction in California because MBUSA was its "agent." Pet. App. 3a.

The Ninth Circuit held that satisfying either of "two *separate* tests" would allow it to "find the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum." Pet. App. 21a. "The first test," the court stated, "is the 'alter ego' test," which is "predicated upon a showing of parental *control* over the subsidiary." *Id.* "The second test . . . is the 'agency' test," which is "predicated upon a showing of the *special importance* of the services performed by the subsidiary." *Id.* The court explained that its agency test relied upon a unique definition of "agency" that applies only in "the context of personal jurisdiction." Pet. App. 28a.

Because Plaintiffs had not alleged that MBUSA and Daimler AG were alter egos, the Ninth Circuit held that the alter-ego test was "not directly at issue" in this case. Pet. App. 21a. Instead, the Ninth Circuit turned to its "'agency' test" and applied a two-part standard for determining whether an "agency" relationship existed between the two corporations for purposes of general personal jurisdiction. Pet. App. 21a–22a.

The court first asked whether "the services provided by MBUSA [were] sufficiently important to [Daimler AG] that, if MBUSA went out of business, [Daimler AG] would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative." Pet. App. 22a. The court concluded that this element of the agency test was met because the "services that MBUSA currently performs are sufficiently important to [Daimler AG] that they would almost certainly be performed by other means if MBUSA did not exist." Pet. App. 25a.

The Ninth Circuit next inquired whether Daimler AG had the "right to control" MBUSA's operations. Pet. App. 26a. The court of appeals explained that "actual control was not necessary," Pet. App. 22a n.12, 27a, and therefore discounted the district court's finding that there was "no evidence whatsoever that [Daimler AG] exercises operational control over MBUSA," Pet. App. 116a. Relying primarily on the General Distributor Agreement between Daimler AG and MBUSA, the court concluded that Daimler AG "had the right to substantially control MBUSA's activities." Pet. App. 30a.

The Ninth Circuit then concluded that exercising jurisdiction over Daimler AG in this case would be reasonable. Pet. App. 43a. The court acknowledged that "German courts have expressed some concern that this suit may impinge upon German sovereignty," but announced that it "d[id] not agree." Pet. App. 34a. The Ninth Circuit further held that Argentina was not an adequate forum, and that, while it was "not clear" whether Germany was an adequate forum, Germany's availability as a forum ultimately did not matter because "American federal courts, be they in California or any other state, have a strong

interest in adjudicating and redressing international human rights abuses." Pet. App. 36a, 38a, 40a. The court therefore concluded that it would "comport[ ] with fair play and substantial justice" for a federal court in California to adjudicate this dispute between foreign plaintiffs and a foreign defendant based on alleged foreign conduct committed by a foreign subsidiary of that defendant's corporate predecessor more than 30 years ago. Pet. App. 41a.

4. The Ninth Circuit denied Daimler AG's petition for rehearing or rehearing en banc. Judge O'Scannlain, joined by seven other judges, dissented from the denial of rehearing. Pet. App. 135a. Judge O'Scannlain criticized the panel for, among other things, "reject[ing] respect for corporate separateness, a well-established 'principle of corporate law deeply ingrained in our economic and legal systems.'" Pet. App. 141a (quoting *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)). Judge O'Scannlain also expressed concern that the Ninth Circuit's decision could "have unpredictable effects on foreign policy and international comity," as well as on "our nation's economy." Pet. App. 144a, 145a. The court's "holding," Judge O'Scannlain declared, "is an affront to due process." Pet. App. 135a.

SUMMARY OF ARGUMENT

I. A corporation is subject to general personal jurisdiction only where its in-state contacts are "so continuous and systematic as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (internal quotation marks omitted). Here, it is undisputed that Daimler AG is not subject to general personal jurisdiction in California based on its own contacts with the State. Daimler AG does not operate in California; it owns no property, sells no vehicles, and employs no workers in the State.

II. The California contacts of MBUSA may not be attributed to Daimler AG. The *only* basis for merging companies for jurisdictional purposes is when the companies are deemed alter egos. Here, Daimler AG and MBUSA observe all corporate formalities, and Plaintiffs do not contend that they are alter egos. The Ninth Circuit erred by nevertheless attributing MBUSA's jurisdictional contacts to Daimler AG under an expansive theory of "agency" that would subject virtually any corporation to general jurisdiction in any State where a subsidiary, distributor, or independent contractor regularly conducts business.

A. The principle of corporate separateness is deeply rooted in American law and business. As this Court has repeatedly recognized, treating a corporation and its stockholders as separate entities promotes investment and economic growth. *See, e.g.*, *Anderson v. Abbott*, 321 U.S. 349, 362 (1944).

This Court has long respected corporate separateness in the jurisdictional context. *See, e.g.*, *Goodyear*, 131 S. Ct. at 2857 ("merging parent and subsidiary for jurisdictional purposes requires an in-

quiry comparable to the corporate law question of piercing the corporate veil") (internal quotation marks omitted). Attributing a subsidiary's jurisdictional contacts to its parent *only* when the two companies are truly alter egos affords defendants the certainty and predictability that due process requires and ensures that defendants are subject to suit only in those jurisdictions in which they themselves possess the requisite minimum contacts. Here, because it is undisputed that Daimler AG and MBUSA are not alter egos, the jurisdictional contacts of MBUSA may not be attributed to Daimler AG.

B. California may not exercise general jurisdiction over Daimler AG on the basis that an "agency" relationship exists between Daimler AG and MBUSA. While an agency relationship may be sufficient in some circumstances to create *specific* jurisdiction over the principal as to claims relating to the agency, it cannot provide a basis for *general* jurisdiction. Indeed, many courts of appeals have declined to recognize an "agency" theory in the general-jurisdiction setting and require a showing of alter ego before a subsidiary's contacts may be attributed to the parent; and even those that do recognize "agency" jurisdiction generally impose a standard akin to an alter-ego requirement.

Even if this Court were to recognize an "agency" theory of general jurisdiction, there is no basis for finding that Daimler AG and MBUSA have an agency relationship. Both companies have expressly disclaimed the existence of an agency relationship between them, there is no fiduciary relationship, and Daimler AG does not exercise operational control over MBUSA's day-to-day activities. Moreover, MBUSA has no right to bind Daimler AG contractually to third parties. The distribution agreement

that governs the relationship between Daimler AG and MBUSA merely gives Daimler AG the right to exercise some control over its brand and intellectual property, establishing a relationship that is typical between foreign manufacturers and their domestic subsidiaries.

This Court should reject the Ninth Circuit's expansive "agency" test because it is not grounded in traditional agency principles and undercuts the doctrine of corporate separateness. Indeed, the Ninth Circuit's standard would be satisfied in virtually every case involving a parent and subsidiary. This flawed approach would subject foreign manufacturers to general jurisdiction based solely on their relationship with a domestic subsidiary or independent distributor. In so doing, it would chill foreign investment in the United States and expose U.S. companies with foreign subsidiaries to retaliatory laws enacted by other nations.

III. Even if Daimler AG had sufficient minimum contacts with California, exercising personal jurisdiction in this case would not be reasonable. This case involves foreign plaintiffs suing a foreign defendant for alleged conduct that occurred in a foreign country more than 30 years ago. Exercising jurisdiction in such a case is *per se* unreasonable. It would also impose a significant burden on Daimler AG and infringe upon the sovereignty of Germany and Argentina, both of which are adequate and far more appropriate forums to resolve this dispute. The Ninth Circuit's view that federal courts possess a "strong interest in adjudicating and redressing international human rights abuses" cannot justify California's exercise of jurisdiction in a lawsuit that has no connection to the United States.

ARGUMENT

I. DAIMLER AG IS NOT SUBJECT TO GENERAL JURISDICTION IN CALIFORNIA BASED ON ITS OWN CONTACTS.

The Due Process Clause prohibits the exercise of personal jurisdiction over a defendant unless the defendant has sufficient contacts with the sovereign. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011). Under the doctrine of "specific jurisdiction," a corporate defendant's "'single or occasional acts' in a State may be sufficient to render a corporation answerable in that State with respect to those acts." *Id.* at 2853 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). But a State may not assert "general" or "all-purpose" personal jurisdiction over a corporate defendant unless the corporation's contacts with the forum State are "so continuous and systematic as to render [it] essentially at home in the forum State." *Id.* at 2851 (internal quotation marks omitted).

"For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place . . . in which the corporation is fairly regarded as at home," such as its "domicile, place of incorporation, and principal place of business." *Goodyear*, 131 S. Ct. at 2853–54. As this Court explained in another jurisdictional context, "'[p]rincipal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities . . . [a]nd in practice it should normally be the place where the corporation maintains its headquarters." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010).

This Court's decision in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), "remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation." *Goodyear*, 131 S. Ct. at 2856 (internal quotation marks and alteration omitted). There, general personal jurisdiction was appropriate because the foreign corporation *itself* had set up its "principal, if temporary, place of business" in Ohio, the forum jurisdiction. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.11 (1984) (describing *Perkins*); *see also Goodyear*, 131 S. Ct. at 2857 (the *Perkins* defendant's "*sole* wartime business activity was conducted in [the forum State]"). Thus, the foreign company unquestionably was "at home" in the forum State: "To the extent that the company was conducting *any* business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio." *Id.* at 2856 (emphasis added).

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), in contrast, the Court held that Texas could not exercise general personal jurisdiction over a Columbian corporation when that corporation lacked "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." *Id.* at 416. The Court emphasized that the foreign corporation did not have a place of business in Texas and never had been licensed to do business in the State; the fact that it purchased equipment from Texas and periodically sent its employees to Texas was not sufficient to support general jurisdiction. *Id.*

Most recently, in *Goodyear*, the Court clarified the limited reach of general personal jurisdiction in a products-liability case involving foreign product manufacturers sued in North Carolina regarding an accident that occurred in France. 131 S. Ct. 2846.

Although the plaintiffs and their decedents were from North Carolina, and the defendants' products had been sold in North Carolina, the Court held that the foreign defendants were "in no sense at home in North Carolina." *Id.* at 2857. *Goodyear* rejected a "sprawling view of general jurisdiction" under which "any substantial manufacturer . . . would be amenable to suit, on any claim for relief, wherever its products are distributed," and explained that "even regularly occurring sales of a product in a State do not justify" the exercise of general jurisdiction there. *Id.* at 2856, 2857 n.6.

There is good reason for limiting the number of jurisdictions in which a corporate defendant is subject to general personal jurisdiction. Unlike specific jurisdiction, general jurisdiction allows the forum to assert authority over a defendant for its conduct anywhere in the world. The forum's authority stems not from a close connection to the *conduct* at issue (as with specific jurisdiction), but from its especially close connection to the particular *defendant*—a connection so systematic, continuous, and substantial that it justifies the adjudication of any dispute involving the defendant. Limiting this type of exposure to those States in which the defendant is "at home"—*e.g.*, the States in which the defendant is incorporated and has its corporate headquarters—allows "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see also Hertz*, 130 S. Ct. at 1193 ("Simple jurisdictional rules . . . promote greater predictability.").

Here, it is uncontested that Daimler AG is not subject to general personal jurisdiction in California

based on its own contacts with the State. *See* Pet. App. 137a (O'Scannlain, J., dissenting from denial of rehearing en banc) ("No one disputes that Daimler itself lacks sufficient contacts with California to render it subject to general personal jurisdiction there."). Daimler AG is a German corporation with its headquarters in Stuttgart, Germany, and it is undisputed that Daimler AG does not operate in California—it owns no property, sells no vehicles, and employs no workers in the State. Accordingly, Daimler AG, by itself, lacks the requisite contacts with California to be subject to general personal jurisdiction in the State.

II. THERE IS NO BASIS FOR ATTRIBUTING MBUSA'S JURISDICTIONAL CONTACTS TO DAIMLER AG.

Despite the undisputed fact that Daimler AG itself lacks sufficient contacts to be subject to general personal jurisdiction in California, the Ninth Circuit held that personal jurisdiction exists in this case because the jurisdictional contacts of MBUSA can be attributed to Daimler AG. According to the Ninth Circuit, Daimler AG can be sued in California based on *any* cause of action arising *anywhere* in the world because MBUSA is Daimler AG's "agent" for purposes of personal jurisdiction. But it was only by disregarding settled principles of corporate separateness and creating a new and expansive conception of "agency" that the Ninth Circuit was able to hold Daimler AG subject to general jurisdiction in California. Under the Ninth Circuit's test, a court could assert general personal jurisdiction over *any* foreign corporation with a domestic subsidiary, distributor, or independent contractor that regularly transacts business in the forum State. Such a sweeping assertion of jurisdiction violates due process and would

impose intolerable burdens on foreign policy, foreign investment, and the federal courts.

A. Attribution Of MBUSA's Jurisdictional Contacts To Daimler AG Is Improper Because The Two Companies Are Not "Alter Egos."

Due process requires affording defendants predictability about the forums in which they are subject to suit and restricting personal jurisdiction to those States in which a defendant possesses sufficient minimum contacts to comport with "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316, 320 (internal quotation marks omitted). Only a showing of an alter-ego relationship is adequate to meet these constitutional requirements where an assertion of general jurisdiction over a defendant is premised on the attribution of another entity's contacts with the forum.

1. This Court has made clear that a "corporation and its stockholders are generally to be treated as separate entities," regardless of "the control which stock ownership gives to the stockholders." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotation marks omitted). On this bedrock principle of our legal and economic systems, "large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson v. Abbott*, 321 U.S. 349, 362 (1944). By reducing the cost of capital, improving the allocation of risk, and enhancing liquidity, the doctrine of corporate separateness "makes possible huge economy in production and in trading," and represents "the only possible engine for carrying on international trade on a scale commensurate with modern needs and opportunities." Stephen B. Presser, *Piercing the Corporate Veil* § 1:1

(2012) (internal quotation marks omitted); *see also* Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. Chi. L. Rev. 499, 503 (1976) ("Far from externalizing the risks of business ventures, the principle of limited liability in corporation law facilitates a form of transaction advantageous to both investors and creditors; in its absence the supply of investment and the demand for credit might be much smaller than they are.").

Corporate separateness is so vital to a functioning economy that "[t]he doctrine of piercing the corporate veil"—in which the corporate form is set aside and stockholders are held accountable for the actions of the corporation—"is the rare exception, applied [only] in the case of fraud or certain other exceptional circumstances." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003); *see also Bestfoods*, 524 U.S. at 62; *Anderson*, 321 U.S. at 362; *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442 (1934). Absent "fraud or injustice" "the doctrine of corporate entity [is] recognized generally and for most purposes." *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307, 322 (1939).

2. This Court has long respected corporate separateness in the context of personal jurisdiction. In *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), for example, this Court concluded that the in-state contacts of a subsidiary corporation doing business in North Carolina were insufficient to establish personal jurisdiction over a parent corporation that itself had no North Carolina contacts. *Id.* at 338. Even though the parent company "dominate[d]" its subsidiary "immediately and completely" "[t]hrough ownership of the entire capital stock and otherwise," "[t]he existence of the [subsidiary] company as a distinct corporate entity [was] . . . in all respects observed." *Id.* at 335. "[T]he corpo-

rate separation carefully maintained" could not "be ignored in determining the existence of jurisdiction" over the parent company, the Court explained, because the "separation, though perhaps merely formal, was real." *Id.* at 336–37; *see also id.* at 338 ("[W]e cannot say that for purposes of jurisdiction, the business of the [subsidiary] corporation in North Carolina became the business of the defendant").

In *Keeton v. Hustler Magazine*, 465 U.S. 770, this Court again applied the doctrine of corporate separateness to a question of personal jurisdiction. The Court held that "[e]ach defendant's contacts with the forum State must be assessed individually," and that, accordingly, "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary." *Id.* at 781 n.13; *see also Rush v. Savchuk*, 444 U.S. 320, 332 (1980). The "fact that jurisdiction may be asserted over Hustler Magazine, Inc." thus did not mean "that jurisdiction may also be asserted over" Hustler's holding company. *Keeton*, 465 U.S. at 781 n.13.

Most recently, in *Goodyear*, this Court indicated that "merging parent and subsidiary for jurisdictional purposes requires an inquiry 'comparable to the corporate law question of piercing the corporate veil.'" 131 S. Ct. at 2857 (quoting Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 14 (1986)).

3. These decisions reflect that due process requires courts to view each defendant *independently* when assessing personal jurisdiction and to give effect to the separate identities of each defendant (and non-parties affiliated with those defendants). *See Rush*, 444 U.S. at 332 ("The requirements of *Interna-*

tional Shoe . . . must be met as to each defendant over whom a state court exercises jurisdiction."). Accordingly, two affiliated corporations may be merged for jurisdictional purposes only where the corporations have failed to adhere to the requirements of their separate corporate identities—in other words, where one is the "alter ego" of the other.

Permitting attribution of jurisdictional contacts only in cases where the corporate veil may be pierced provides the predictability necessary for due process. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring). This Court has repeatedly emphasized that "[t]he Due Process Clause . . . allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297 (citation omitted). Attributing the contacts of a subsidiary to a parent only when the corporations are alter egos provides a predictable jurisdictional rule that is critical for "corporations making business and investment decisions," *Hertz*, 130 S. Ct. at 1193, a concern that is heightened for companies engaged in "international business transaction[s]." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (noting "the need of the international commercial system for predictability").

Corporations have long been familiar with the alter-ego doctrine and know how to conform their conduct to avoid veil-piercing. *See Bestfoods*, 524 U.S. at 62–63 (describing veil-piercing as a "fundamental principle of corporate law" and a "well-settled rule"). "A more free-wheeling approach to veil piercing would hamstring established businesses in their le-

gitimate efforts to expand into new fields; undermine the predictability of corporate risk-taking; and provide a huge disincentive for the investment of venture capital." *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1093 (1st Cir. 1992) (Selya, J., joined by Breyer, C.J., and Cyr, J.). Any lesser standard would deprive companies of the "foreseeability that is critical to due process analysis." *World-Wide Volkswagen*, 444 U.S. at 297.[3]

In addition, the alter-ego test ensures that the foreign defendant being haled into court has sufficient contacts with the forum State to be subject to general jurisdiction there. After all, "the constitutional touchstone" of personal jurisdiction is whether "*the defendant*" itself has "established 'minimum contacts' in the forum." *Burger King*, 471 U.S. at 474 (quoting *Int'l Shoe*, 326 U.S. at 316) (emphasis added). Relying on the jurisdictional contacts of a separate corporate entity to establish personal jurisdiction would run counter to "'traditional notions of fair play and substantial justice'" that underpin this Court's personal-jurisdiction jurisprudence, *Int'l Shoe*, 326 U.S. at 316 (citation omitted)—unless the two corporations are truly one and the same entity. Only if the subsidiary is in fact the alter ego of the parent company would it be fair to treat the parent company as "at home" in the subsidiary's home jurisdiction. *See NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 176 (2d Cir. 2008) (explaining

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[3] Determining the appropriate alter-ego test through the forum State's choice-of-law rules will help ensure foreseeability, at least in cases where familiar and well-recognized alter-ego standards are fairly applied.

that an alter ego is the "mere instrumentality . . . of its owner") (internal quotation marks omitted).

4. It is undisputed that Daimler AG is not MBUSA's alter ego. "Plaintiffs do not seek to demonstrate that MBUSA is an alter ego of [Daimler AG]," Pet. App. 114a, and do not contest that Daimler AG and MBUSA have maintained all the formalities of their separate corporate identities: the two companies have separate boards of directors, officers, and employees; separate books and records; and each corporation is responsible for its own day-to-day decision-making. *See* J.A. 129a–130a; *see also, e.g.*, *William Wrigley Jr. Co. v. Waters*, 890 F.2d 594, 600–01 (2d Cir. 1989) (describing veil-piercing factors); *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691–92 (5th Cir. 1985) (same). Because Daimler AG and MBUSA have adhered to the formalities of corporate separation and are not alter egos of each other, MBUSA's jurisdictional contacts with California cannot be attributed to Daimler AG.[4]

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[4] Moreover, although the Court need not decide the issue to reverse the decision below, this Court's precedent indicates that MBUSA itself—which is incorporated in Delaware and has its principal place of business in New Jersey—is not "at home" in California for purposes of general personal jurisdiction. *See Goodyear*, 131 S. Ct. at 2853–54 (for a corporation, "the paradigm forum for the exercise of general jurisdiction" is where "the corporation is fairly regarded as at home," such as its "domicile, place of incorporation, and principal place of business").

B. Attribution Of MBUSA's Jurisdictional Contacts To Daimler AG May Not Rest On An "Agency" Theory.

The Ninth Circuit did not purport to find that Daimler AG and MBUSA were alter egos. It nonetheless held that MBUSA's jurisdictional contacts with California could be attributed to Daimler AG—and that Daimler AG was therefore subject to general personal jurisdiction in the State—on the theory that MBUSA was Daimler AG's "agent." In reaching this conclusion, the Ninth Circuit relied on a malleable and expansive conception of "agency" that is unknown elsewhere in the law and that the court acknowledged did not apply "[o]utside the context of personal jurisdiction." Pet. App. 28a.

The Ninth Circuit's approach is deeply flawed. It would violate due process to premise general jurisdiction on an agency relationship between the defendant and another entity. In any event, MBUSA is not Daimler AG's "agent" for jurisdictional purposes because neither company consented to agency, there is no fiduciary relationship between them, and Daimler AG does not exercise day-to-day operational control over MBUSA.

1. While an agency relationship may be sufficient in some circumstances to give rise to *specific* jurisdiction, it cannot support a finding of *general* jurisdiction—*i.e.*, jurisdiction over claims that have no connection to the agency itself. A corporation is not "at home" wherever its agents are located. *Goodyear*, 131 S. Ct. at 2851.

In *Burger King*, this Court recognized that an agency relationship might give rise to *specific* personal jurisdiction over a foreign defendant for activi-

ties "carried on in behalf" of that defendant. 471 U.S. at 479 n.22 (internal quotation marks omitted). The Court cited *Calder v. Jones*, 465 U.S. 783 (1984)—a specific jurisdiction case—for the proposition that jurisdiction may exist where the defendant is a "'primary participan[t]' in the enterprise and has acted purposefully in directing" the agent's activities giving rise to the suit. *Burger King*, 471 U.S. at 479 n.22 (alteration in original) (quoting *Calder*, 465 U.S. at 790). But this Court has never suggested that an agency relationship is sufficient to extend *general* personal jurisdiction over a foreign defendant.

Consistent with *Burger King*—and with the principles of corporate separateness discussed above—many courts have declined to treat "agency" as a permissible basis for general jurisdiction, holding that the contacts of a subsidiary may be attributed to the parent *only* when the companies are alter egos. The Eighth Circuit, for example, has held that "personal jurisdiction can be based on the activities of [a] nonresident corporation's in-state subsidiary . . . *only* if the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego." *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011) (alterations in original; internal quotation marks omitted; emphasis added); *see also Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003). The Seventh Circuit has similarly held that "[w]here two corporations are in fact separate, permitting the activities of the subsidiary to be used as a basis for personal jurisdiction over the parent violates . . . due process." *Cent. States, Se. & Sw. Ar-*

eas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 944 (7th Cir. 2000).

The Fourth, Fifth, and Sixth Circuits are in accord. *See Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir.), *cert. denied*, 132 S. Ct. 575 (2011); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008). Indeed, in examining facts indistinguishable from those in this case, the Sixth Circuit held that Toyota Motor Corporation Worldwide, a Japanese corporation, was *not* subject to general personal jurisdiction in Ohio based on the forum-state contacts of its U.S. subsidiary, Toyota Motor Sales, U.S.A., Inc., because the two companies complied with corporate formalities and were "not alter egos." *Toyota Motor Corp.*, 545 F.3d at 363.

With the exception of the Second and Ninth Circuits, even those courts that *have* permitted the attribution of jurisdictional contacts based on an "agency" relationship between parent and subsidiary have required a showing akin to alter ego—that is, that the two corporations are "so intertwined as to demonstrate that the two corporations are, in reality, a single entity." *Miller v. Honda Motor Co.*, 779 F.2d 769, 772 (1st Cir. 1985). If, on the other hand, "the day to day operational decisions of each company are made by separate groups of corporate officers," then permitting "jurisdiction over [the principal] would offend all notions of fair play and due process." *Id.*; *see also Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1294 (11th Cir. 2000) (plaintiff failed to show that the subsidiary was "merely [an] agent" because the subsidiary had "its own officers and boards of directors . . . [and] its own bank accounts[,] offices, and employees").

These courts are correct in rejecting the exercise of general personal jurisdiction upon a showing of anything less than an alter-ego relationship between the defendant and its in-state affiliate. As explained above, only an alter-ego test can provide defendants with the predictability mandated by due process and ensure that they are subject to general jurisdiction only in those States in which their own jurisdictional contacts are so significant as to render them "at home." *Goodyear*, 131 S. Ct. at 2851.

2. Even if this Court were to recognize an "agency" theory of general jurisdiction—and it should not—Daimler AG would not be subject to general personal jurisdiction in California because it does not have an agency relationship with MBUSA.

Any agency test applied in the general-jurisdiction setting would have to provide defendants with the notice and predictability that due process requires. *See World-Wide Volkswagen*, 444 U.S. at 297. Any such test would also need to ensure that defendants are subject to general jurisdiction only where they—and not just their agents—have sufficient contacts to render them "at home" in the forum State. *Goodyear*, 131 S. Ct. at 2851; *Int'l Shoe*, 326 U.S. at 316. Thus, at a minimum, general jurisdiction based on an agency theory would have to be limited to cases where the putative principal and agent have established a bona fide agency relationship sufficient to pierce the corporate veil under applicable agency principles.

Individuals and corporations alike have long been able to rely on established principles of agency law to manage risk and liability. *See Gleason v. Seaboard Air Line Ry. Co.*, 278 U.S. 349, 356 (1929) ("[F]ew doctrines of the law are more firmly estab-

lished" than the "rule which fastens on the principal liability for the acts of his agent"). It is widely accepted that a principal-agent relationship will not be recognized unless several fundamental elements are satisfied, including "assent" by both parties to the agency relationship, the existence of fiduciary duties between the parties, and the principal's "control" over the agent's actions. *See* Restatement (Third) of Agency § 1.01 (2006); *see also Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392 (1982) ("'Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'") (quoting Restatement (Second) of Agency § 1(1) (1958)). Any agency-based jurisdictional test must therefore include those basic requirements.

In addition, in order to ensure that the principal (and not just the agent) has the requisite contacts with the forum State to justify the exercise of general jurisdiction, any agency test must require that the foreign defendant exercise pervasive and total control over the in-state agent's day-to-day operations. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 628 (1983) ("[W]here a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other."). Only in such circumstances is the agency relationship sufficient to pierce the corporate veil between the principal and agent. *See, e.g., Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 839–45 (D. Del. 1978) (an agency relationship should give rise to veil piercing only where the principal exercises "actual, participatory, and total [control]" and "complete dom-

ination" over the agent). In the words of then-Chief Judge Cardozo, there are certain relationships in which "[d]ominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent." *Berkey v. Third Avenue Ry.*, 155 N.E. 58, 61 (N.Y. 1926). Only that type of "obtrusive" relationship—in which the principal's domination of the agent is complete—could even arguably give rise to general jurisdiction over a parent corporation in its subsidiary's home forum.

The relationship between Daimler AG and MBUSA does not constitute an agency—let alone, the type of agency relationship sufficient to pierce the corporate veil between Daimler AG and MBUSA. "At the core of agency is a 'fiduciary relation' arising from the 'consent by one person to another that the other shall act on his behalf and subject to his control.'" *Gen. Bldg. Contractors*, 458 U.S. at 393 (quoting Restatement (Second) of Agency § 1(1) (1958)). Here, "the critical legal document that defines [Daimler AG's] relationship with MBUSA" is the General Distributor Agreement. Pet. App. 9a. That Agreement *expressly disclaims* a fiduciary relationship and leaves no doubt that the companies did *not* consent to agency. Specifically, the Agreement states that MBUSA is an "independent contractor[ ]" operating an "independent business for [its] own account," *not* a "general or special agent, partner, joint venture or employee of" Daimler AG. J.A. 179a. The Agreement also declares that it "does not create any fiduciary relationship or any other relationship of trust or confidence" between Daimler AG and MBUSA. *Id.*

Nor does Daimler AG exercise the requisite day-to-day control over MBUSA. The district court found

"no evidence whatsoever" that Daimler AG "exercises operational control over MBUSA." Pet. App. 116a. That finding was correct and warrants deference. Far from giving Daimler AG operational control over MBUSA, the Agreement merely establishes the contractual terms by which Daimler AG permits MBUSA to distribute its vehicles and use its trademarks. For example:

- The Agreement contemplates that MBUSA and Daimler AG will "agree upon quantitative and/or qualitative objectives to be reached" by MBUSA during each Sales Period, including sales targets. J.A. 153a.
- Even when the parties do not agree on specific terms, Daimler AG may not unilaterally impose targets on MBUSA—such targets are based on sales from the previous sales period. J.A. 155a–156a.
- MBUSA "ha[s] the power to independently decide against buying" certain types of Daimler AG's vehicles. Pet. App. 58a. In fact, until 2001, MBUSA decided against buying G-Class vehicles from Daimler AG. J.A. 147a.
- Either party may terminate the Agreement for good cause or with notice. J.A. 187a–188a.

Moreover, although the Agreement provides Daimler AG with the right to be notified of (and, in some cases, approve) authorized resellers and personnel decisions, and grants Daimler AG the authority to set certain standards with respect to advertising Daimler AG's vehicles and using Daimler AG's trademarks, *see*, *e.g.*, J.A. 171a–174a, these provi-

sions merely provide Daimler AG with a measure of control over its brand and intellectual property—not over the day-to-day operations of MBUSA. In fact, the very existence of the Agreement underscores the fact that Daimler AG does not control MBUSA's operations. If Daimler AG dominated the affairs of MBUSA, there would have been no need for Daimler AG to enter into a contract with MBUSA that grants Daimler AG certain defined rights with respect to the manner in which its vehicles are distributed in the United States; Daimler AG could simply have relied upon that domination over MBUSA to control the manner of distribution.

At bottom, the distribution agreement in this case is typical of relationships between foreign parent companies and domestic subsidiaries. *See, e.g.*, *Toyota Motor Corp.*, 545 F.3d at 363; *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998); *Honda Motor Co.*, 779 F.2d at 772; *Rasmussen v. Gen. Motors Corp.*, 803 N.W.2d 623, 624–28 (Wis. 2011). Asserting general jurisdiction over Daimler AG in California based solely on its distribution agreement with MBUSA would create an unworkable jurisdictional rule that violates the Due Process Clause, *see World-Wide Volkswagen*, 444 U.S. at 297, and leave countless foreign companies vulnerable to general jurisdiction in every State where their subsidiaries do business, or where they have distributors, independent contractors, or other ordinary business relationships.[5]

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[5] Even if MBUSA were the "agent" of Daimler AG—and agency could be a basis for attributing contacts for purposes of general jurisdiction—that would mean at most that the two corporations should be treated as a "single enterprise" for jurisdictional purposes. *Goodyear*, 131 S. Ct. at 2857. The question

3. If this Court does hold that some agency relationships may be sufficient to give rise to general personal jurisdiction, it should nevertheless reject the Ninth Circuit's expansive "agency" test. Under the Ninth Circuit's standard, a corporation is subject to general jurisdiction whenever (1) an entity performs in-state services that are of "special importance" to the foreign corporation, and (2) the foreign corporation has the "right to control" the entity performing those in-state services. Pet. App. 21a–22a. This novel definition of "agency"—which the Ninth Circuit acknowledged it would not apply "[o]utside the context of personal jurisdiction," Pet. App. 28a—fails to provide the jurisdictional predictability and fairness mandated by the Due Process Clause.

Under the Ninth Circuit's "agency" test, the court first asks whether the services being performed by the in-state entity are "important" enough that, in the absence of the in-state entity, the foreign defendant would find "other means" to undertake the activity—"whether by . . . performing those services itself or by . . . entering into an agreement with a new subsidiary or a non-subsidiary . . . for the performance of those services." Pet. App. 25a. But this standard

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[Footnote continued from previous page]

would remain whether that combined enterprise is "at home" in California. *Id.* at 2851; *see also Perkins*, 342 U.S. at 447–48 (deciding that the foreign company *as a whole* was "at home" in Ohio because the Ohio headquarters were its "sole[ ]" wartime operations). Even if MBUSA were a division of Daimler AG rather than a separate corporation, Daimler AG would still be a German corporation headquartered in Germany, and would still not be "at home" in California. *See Hertz*, 130 S. Ct. at 1192.

would be satisfied in virtually every case where a foreign defendant has a relationship with a third party that performs services on its behalf in the forum State. "*Anything* a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." Pet. App. 140a (O'Scannlain, J., dissenting from denial of rehearing en banc) (emphasis added).

Next, the Ninth Circuit's test asks whether the foreign corporation has the "right to control" the domestic entity; "actual control," however, "[i]s not necessary." Pet. App. 27a. Like the first element of the Ninth Circuit's test, this standard would be satisfied in virtually every case involving a parent and subsidiary. A corporate parent always has the *right* to control a subsidiary, even if the parent company does not actually exercise day-to-day control. *See United States v. Scophony Corp. of Am.*, 333 U.S. 795, 814 (1948) (even if a foreign parent company is "nothing more than a shareholder for investment purposes," it would have "voting rights and control" over the subsidiary). In fact, "a parent corporation [is] so-called *because of control* through ownership of another corporation's stock." *Bestfoods*, 524 U.S. at 61 (emphasis added); *id.* at 61–62 (it is "hornbook law" that "stock ownership gives to the stockholders" "the exercise of the control," which includes "the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders") (internal quotation marks omitted; alteration in original).

The Ninth Circuit's "agency" test ignores the well-settled requirements for establishing an agency relationship sufficient to pierce the corporate veil be-

tween two distinct entities. For example, the test fails to consider whether the subsidiary owes a fiduciary duty to the parent, *see* Restatement (Third) of Agency § 1.01 cmt. e (2006), whether the subsidiary has the power to act on behalf of the parent and affect the parent's legal rights and duties, *see id.* at cmt. c, and whether the parent exercises pervasive control over the day-to-day activities of the subsidiary. *See First Nat'l City Bank*, 462 U.S. at 628–29. Because the Ninth Circuit's boundless "agency" test is unpredictable and malleable—potentially ensnaring any foreign corporation with a subsidiary, distributor, or independent contractor in the forum State—and allows a State to exercise personal jurisdiction over a defendant without regard for the defendant's *actual* contacts in that State, it violates the Due Process Clause. *See World-Wide Volkswagen*, 444 U.S. at 297; *see also Burger King*, 471 U.S. at 474 ("[T]he constitutional touchstone" of personal jurisdiction is "minimum contacts.").

The Ninth Circuit's expansive "agency" test also poses substantial policy concerns for the United States. It would allow a proliferation of suits against foreign defendants in American courts challenging conduct that occurred outside the United States—anything and everything from a false advertising claim arising out of a product sold in Japan, to a dispute involving a contract made and performed in Brazil, to a workplace dispute concerning a factory in Germany, simply because the foreign defendant has a commercial relationship with a U.S. entity. The Ninth Circuit's rule would turn the federal judiciary into an international tribunal for disputes arising anywhere in the world.

Such an expansive conception of general jurisdiction provides a strong incentive for foreign compa-

nies to limit or end their commercial ties to the United States, and to direct their investments to alternate markets with more predictable legal risks. It deters them from establishing subsidiaries in the United States, hiring U.S.-based independent contractors, or engaging in transactions with domestic distributors and other business partners. That, in turn, risks diminishing the flow of foreign-manufactured goods and other foreign investments into the United States, to the detriment of U.S. consumers and the U.S. economy. As President Obama has stated, foreign direct investment "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity, and support[s] American communities." Statement by the President on United States Commitment to Open Investment Policy (June 20, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy.

Allowing the Ninth Circuit's jurisdictional rule to stand would also encourage foreign nations to enact retaliatory jurisdictional laws that threaten U.S. companies with subsidiaries abroad. *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987) (citing retaliatory laws in Belgium, Italy, and elsewhere); *cf.* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 679–83 (5th ed. 2011) (describing retaliatory claw-back statutes in the United Kingdom). As Judge O'Scannlain explained, "several countries have enacted retaliatory jurisdiction laws" that "empower national courts to exercise jurisdiction over foreign persons in circumstances where the courts of the foreigner's home state would have asserted jurisdiction." Pet. App. 144a (O'Scannlain, J., dissenting

from denial of rehearing en banc) (internal quotation marks omitted). Such retaliation could result in a reduction in U.S. exports at a time when exports are increasingly important to the health of the U.S. economy. *See, e.g.*, Exec. Order No. 13,534, § 1, 75 Fed. Reg. 12,433, 12,433 (Mar. 11, 2010) ("A critical component of stimulating economic growth in the United States is ensuring that U.S. businesses can actively participate in international markets by increasing their exports of goods, services, and agricultural products."). In fact, such expansive and extraterritorial application of personal jurisdiction has already harmed U.S. foreign-policy interests. "[F]oreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 33, *Goodyear*, 131 S. Ct. 2846 (No. 10-76); *see also* Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 161.

Finally, permitting expansive assertion of personal jurisdiction against foreign defendants for foreign conduct—based solely on the foreign defendant's ties to an uninvolved domestic entity—also places United States courts out of step with international jurisdictional standards. Article 2 of the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments, for example, permits general jurisdiction over member-state defendants only in their state of domicile. Allen R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. Rev. 527, 532 (2012). It would never be reasonable anywhere in the European Union to exercise general personal jurisdiction in a case like

this one, and it should not be considered reasonable here.

III. It Would Be Unreasonable For California Courts To Assert General Personal Jurisdiction Over Daimler AG.

Even if Daimler AG had the necessary minimum contacts with California through its relationship with MBUSA to be considered "at home" in that State, due process would still require that the exercise of jurisdiction be "reasonable[ ]." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). As this Court has made clear, the "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if" the defendant otherwise has sufficient contacts with the forum. *Burger King*, 471 U.S. at 477–78 (citation omitted). Subjecting Daimler AG to general personal jurisdiction in California in this case—where all of the parties are foreign and the alleged conduct and injury occurred entirely overseas—would not be reasonable.

A. It Is *Per Se* Unreasonable To Exercise General Jurisdiction Over A Foreign Company For Purely Foreign Conduct Based Solely On Its Relationship With An Uninvolved Domestic Entity.

This Court has cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (internal quotation marks omitted). And it has "admonished [lower] courts . . . to consider the procedural and substantive policies of other nations whose interests are affected

by the assertion." *Id.* (emphasis omitted). Conduct occurring in a foreign nation is already governed by that country's laws. Accordingly, the assertion of jurisdiction by a U.S. court seeking to apply U.S. law, or a U.S. interpretation of foreign law, to alleged foreign conduct raises the "obvious" "probability of incompatibility" with "the applicable laws of other countries." *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2885 (2010). This Court recently warned that such cases present a unique "danger of unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

The Ninth Circuit went out of its way to assert jurisdiction in this case even though the plaintiffs are foreign, the defendant is foreign, and the alleged conduct occurred in a foreign land and implicates actions by a foreign government. That is *per se* unreasonable where, as here, the subsidiary corporation that provides the jurisdictional "hook" has no relationship to the alleged conduct at issue. Plaintiffs did not even ask the courts in California to exercise jurisdiction over MBUSA because all of the allegations involved Mercedes-Benz Argentina—a different Daimler AG subsidiary that Plaintiff chose not to name as a defendant—not MBUSA. J.A. 25a–27a.

B. Every Relevant Factor Weighs Against Exercising General Jurisdiction Over Daimler AG In This Case.

Even in the absence of a *per se* rule, the exercise of jurisdiction in this case would still be unreasonable. The constitutional "reasonableness" inquiry focuses on the "general fairness" of subjecting the defendant to the jurisdiction of a foreign tribunal. *Per-*

kins, 342 U.S. at 444; *see also Goodyear*, 131 S. Ct. at 2857 n.5; *World-Wide Volkswagen*, 444 U.S. at 294. In analyzing reasonableness, a "court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief," and "must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering substantive social policies.'" *Asahi*, 480 U.S. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

The district court carefully considered these factors and concluded that the "exercise of general jurisdiction over [Daimler AG] in this action would be unreasonable." Pet. App. 91a. In reversing that judgment, the court of appeals simply ignored the district court's careful weighing of the evidence. But the district court had it right—every relevant factor weighs against the exercise of jurisdiction over Daimler AG.

Burden on the Defendant. Because Daimler AG is a German corporation with no officers, employees, or presence in California, requiring Daimler AG to defend a lawsuit in the State would impose a "significant burden"—even more so where, as here, the allegations have no relationship to California or the United States. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988). None of the relevant parties, witnesses, or documents is present in the forum. Daimler AG would have to endure a costly, time-consuming, and uncertain process to obtain access to witnesses and secure their participation in a U.S. proceeding. Indeed, the language challenges alone would be tremendous. The language of the documents, and the native tongues of the witnesses, would be Spanish and perhaps German.

German witnesses potentially testifying through a German-English interpreter about Spanish-language documents before a U.S. court would create inefficiency and confusion.

Sovereignty of Foreign Nations. As both the district court and the Ninth Circuit noted, "German courts have expressed . . . concern that this suit may impinge upon German sovereignty." Pet. App. 34a; *see also* Pet. App. 121a.[6] This Court regularly credits the concerns of foreign nations that extraterritorial application of U.S. law would interfere with their sovereign interests. *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167–68 (2004). But the Ninth Circuit refused to give credence to Germany's concern, declaring simply that it "d[id] not agree." Pet. App. 34a.

The potential for this case to invade the sovereignty of both Argentina and Germany is "obvious." *Morrison*, 130 S. Ct. at 2885. Plaintiffs seek to have U.S. courts apply Argentine *as well as* U.S. law to conduct that occurred wholly within Argentina. *See* J.A. 57a (asserting claims "under the laws of California . . . and Argentina"); *see also* J.A. 50a. Such extraterritorial application of U.S. law runs a high probability of conflicting with the liability regime in the nation where the alleged conduct occurred. *See Morrison*, 130 S. Ct. at 2885. Similarly, "[t]he Federal Republic of Germany has an inherent interest in

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[6] The Federal Republic of Germany reiterated its concern directly to this Court as *amicus curiae* in *Kiobel*, citing the Ninth Circuit's ruling in *Bauman* as "potentially interfer[ing]" with its sovereignty because the case has "little or no significant nexus with the United States." Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 10 & n.3, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

applying its laws and using its courts in cases in which German defendants are accused of the violation of international customary laws." Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 10, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). And this Court has acknowledged Germany's expressed interest "'in seeing that German companies are not subject to the extraterritorial reach of the United States' . . . laws by private foreign plaintiffs.'" *F. Hoffman-La Roche Ltd.*, 542 U.S. at 167–168 (quoting Brief for Government of Federal Republic of Germany et al. as *Amici Curiae* at 2).

Interests of the Forum State. The Ninth Circuit reasoned that California has "a significant interest in adjudicating the suit" because all "American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses" occurring anywhere in the world. Pet. App. 36a. To support this remarkable assertion, the court of appeals relied exclusively on the "policy" objectives it believed were enshrined in the Alien Tort Statute and the Torture Victims Protection Act. Pet. App. 36a–37a. But Plaintiffs' claims under those provisions are no longer cognizable. *See Kiobel*, 133 S. Ct. at 1669; *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012). Nor is the Ninth Circuit's approach consistent with this Court's prior recognition that the forum State's interest typically turns on whether the parties are state residents or the conduct occurred within state borders. *See, e.g.*, *Asahi*, 480 U.S. at 114 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished.").

Availability of Alternative Forums. This Court has looked to the availability of "more conven-

ient" forums in assessing the reasonableness of personal jurisdiction. *See Asahi*, 480 U.S. at 114. In *Asahi*, this Court made clear that it is a *plaintiff's* burden to show that a more convenient forum is *not* available. *See id.* Indeed, the Court held that the assertion of jurisdiction was unreasonable in that case in part because the plaintiff had "not demonstrated that it [was] more convenient for it to litigate its indemnification claim . . . in California rather than in Taiwan or Japan." *Id.*; *cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (plaintiffs have the burden to show that the alternative forum "is so clearly inadequate or unsatisfactory that it [provides] no remedy at all").

The Ninth Circuit took exactly the opposite approach in this case, requiring Daimler AG to prove that courts in Germany or Argentina were more appropriate forums than California. *See* Pet. App. 38a–41a. Indeed, the court of appeals did not even resolve that issue, dismissing the entire inquiry after concluding that the availability of Germany as an alternative forum was "not clear." Pet. App. 40a. A proper analysis would have led the court of appeals to conclude, as the district court did, that "both Argentina and Germany provide [Plaintiffs] with an adequate alternative forum for their claims." Pet. App. 85a.

First, Plaintiffs failed to prove that Germany is not an adequate alternative forum. As Daimler AG's expert Dr. Stefan Rützel explained (and the district court accepted), "German law would allow a human rights action against a corporation" and "Argentine citizens would have access to German courts for a suit like this one." Pet. App. 91a. Plaintiffs' only response was to offer the opinion of a legal expert who "cite[d] no law in support of his claims." Pet. App.

90a. Indeed, the district court noted that Plaintiffs' submission was so deficient that it amounted to a "failure to address the argument" entirely. Pet. App. 91a. The Ninth Circuit did not acknowledge these glaring omissions and deficiencies, noting only that there was "conflicting expert testimony" on German law. Pet. App. 40a.

Second, Plaintiffs failed to prove that Argentina is not an adequate alternative forum. The Ninth Circuit held that Argentina is not suitable because Argentina's statute of limitations would make it "unlikely" that Plaintiffs could bring a suit there. Pet. App. 39a n.18. But that cursory analysis ignored the district court's "conclus[ion] that [Daimler AG] has cited sufficient authorities to refute plaintiffs' contention that they may not bring their claims in Argentina." Pet. App. 125a. In fact, the district court noted "evidence of a somewhat similar lawsuit against Ford Motor Company in Argentina." Pet. App. 86a.

The Ninth Circuit also questioned Plaintiffs' ability to get a fair trial in Argentina. Pet. App. 39a n.18. But the district court was "reluctant to find [the Argentine] courts corrupt or biased," Pet. App. 127a (internal quotation marks omitted), relying instead on the U.S. State Department's report, which noted that Argentine "law provides for the right to a fair trial, and the independent judiciary generally enforce[s] this right," Argentina Country Report on Human Rights Practices at 7 (2012), *available at* http://www.state.gov/documents/organization/204633.pdf. The court of appeals should have given deference to the district court's findings and held that Plaintiffs failed to carry their burden of proof.

CONCLUSION

Daimler AG—a German company that conducts no operations in the United States—cannot plausibly be said to be "at home" in California. And the complaint in this case—filed by foreign plaintiffs against a foreign defendant alleging conduct in a foreign country—has nothing to do with California. Requiring Daimler AG nevertheless to answer those allegations in a California court would be an unwarranted and unconstitutional departure from the "traditional notions of fair play and substantial justice" that animate this Court's personal-jurisdiction jurisprudence. *Int'l Shoe*, 326 U.S. at 316 (internal quotation marks omitted).

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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June 27, 2013

RESPONDENT'S BRIEF

No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the substantial in-state economic activity of an out-of-state defendant's wholly owned subsidiary must be disregarded for purposes of the "minimum contacts" analysis, unless a court determines that the two corporations are "alter egos" under the state law corporate veil piercing standard dictated by choice of law principles applicable to the litigation.

2. Whether an exercise of general jurisdiction over a foreign defendant for foreign conduct is per se unconstitutional when the defendant's contacts with the forum are established through its relationship with an "uninvolved domestic entity."

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INTRODUCTION

Petitioner has made billions of dollars through sales of its luxury cars in California. Rather than sell those cars to dealers through a division of its company, petitioner created a wholly owned subsidiary that operated in materially the same way as a subdivision would: the subsidiary and parent company had the same chairman; the subsidiary sold cars solely for the parent company; the parent company set prices for the cars and had authority over virtually all aspects of the subsidiary's operations; and all profits went to the parent.

This case presents the questions (1) whether the subsidiary's contacts were properly considered in assessing the constitutionality of exercising general personal jurisdiction over petitioner; and (2) whether the fact that petitioner used a wholly owned subsidiary to sell its cars in California, rather than a subdivision, makes it per se unconstitutional for a court in that forum to hear a claim against petitioner for conduct that took place overseas.

Both are questions about the "outer boundaries" of legislative authority, not what rule strikes this Court as the most fair or the best policy. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011). The Constitution assigns authority for developing rules of personal jurisdiction first and foremost to Congress and the states, subject only to the limits of the Due Process Clause. These democratically accountable bodies are best suited to respond to relevant changes in technology and business practices, the public's evolving conceptions of fairness, and the interstate and foreign relations

implications of exercises of jurisdiction over out-of-state defendants.

At the federal level, the Constitution empowers Congress to establish rules governing the jurisdiction of federal trial courts and, through its power to regulate interstate and foreign commerce, to preempt state jurisdictional practices that interfere with interstate or international trade. However, for better or worse, under the Federal Rules of Civil Procedure promulgated by this Court, federal courts ordinarily apply the personal jurisdiction rules of the states in which they sit, even though the majority of states have elected to extend their long-arm statutes to the full extent permitted by the Due Process Clause.

Because the limits of the Due Process Clause effectively provide the operative jurisdiction rule, there is a temptation to ask what is the best rule that should apply, as if the courts had been delegated the responsibility for developing rules of personal jurisdiction through the common law method. But the task at hand is not to fill the void in legislative decision making with judicial policy judgment, but to discern the outer limits of what the Constitution permits the people's elected representatives to adopt. The risk that the legislative branches may choose unwisely, or that the resulting rule might upset our international trading partners or be bad for the economy, is a reason for the Executive Branch to work with Congress to enact appropriate laws (including laws with preemptive effect) to avoid those ills. The Due Process clause is not a shortcut for avoiding difficult legislative or diplomatic work.

In this case, nothing in the Constitution requires a legislature to give determinative weight to the fact that rather than sell its cars through a subdivision,

petitioner has chosen to use a tightly controlled wholly owned subsidiary.

STATEMENT OF THE CASE

1. Respondents are former employees, and representatives of deceased employees, of the González Catán plant of Mercedes-Benz Argentina, a wholly owned subsidiary of DaimlerBenz, petitioner's predecessor-in-interest. Pet. App. 3a. During the period of terror perpetrated by Argentina's military dictatorship between 1976 and 1983 – known as the "Dirty War" – Mercedes-Benz Argentina identified respondents as "subversives" or "agitators" to state security forces stationed within its plant, knowing that respondents would be kidnapped, detained, tortured, or murdered as a result. *Id.* 3a-4a & n.3. After respondents were arrested or "disappeared," Mercedes-Benz Argentina hired the police chief behind the raids as its Chief of Security, and provided him with legal representation when he was subsequently accused of human rights abuses. *Id.* 3a-4a.

2. Respondents brought suit in 2004 against petitioner, DaimlerChrylser AG, in the Northern District of California. The complaint included counts under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. J.A. 49a (First Am. Complaint ¶ 57). Respondents also brought claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina. *Id.* 55a-57a (First Am. Complaint ¶¶ 72-79). They alleged that petitioner was responsible for the acts of its Argentine subsidiary, and that suit was properly brought in California in light of the substantial and

systematic business petitioner conducts in that state through its wholly owned subsidiary, Mercedes-Benz USA (MBUSA). Pet. App. 95a, 104a.

Respondents originally attempted to serve process at petitioner's headquarters in Stuttgart, Germany. A German trial court allowed service, but its order was stayed pending an appeal. Pet. App. 4a & n.4. Respondents then attempted to serve petitioner in the United States in light of its 1998 merger with American auto manufacturer Chrysler Corporation, which formed DaimlerChrysler AG, the petitioner in this case. *Id.* 5a. In a proxy statement, petitioner stated that "[f]ollowing consummation of the Chrysler Merger, DaimlerChrysler AG will have its registered seat in Stuttgart, Germany and will maintain two operational headquarters – one located at the current Chrysler headquarters, 1000 Chrysler Drive, Auburn Hills, Michigan 48326-2766, and one located at the current Daimler-Benz headquarters, Epplestrasse 225, 70567 Stuttgart, Germany."[1] The company's website further announced that the former Chairmen/CEOs from Chrysler and DaimlerBenz were "Co-Chairmen and Co-Chief Executive Officers" of DaimlerChrysler AG." Pet. App. 5a. Each maintained "offices and staff in both" the Auburn

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[1] Decl. of Brian P. Campbell in Supp. of Pls.' Opp'n to Mot. to Quash Serv. of Process & to Dismiss for Lack of Personal Jurisdiction, Ex. 1 at 8; *see also* Pet. App. 5a. In its cert. reply brief, petitioner claimed that this statement "refers to the DaimlerChrysler group of companies as a whole," Cert. Reply 11, but the statement quite clearly referred to "DaimlerChrysler *AG*" in a legal document that was carefully reviewed by petitioner's counsel for accuracy.

Hills and Stuttgart headquarters. *Id.* 6a. (internal quotation marks omitted).

Respondents therefore served petitioner at its headquarters in Auburn Hills, Michigan. Petitioner attempted to quash service but withdrew its motion after respondents produced documents showing that the Michigan and Stuttgart offices were "dual operational headquarters." Pet. App. 5a-6a (internal quotation marks omitted); *see also id.* 98a.

Petitioner then moved to dismiss for lack of personal jurisdiction. It did not dispute that if MBUSA's contacts were properly considered, they would be sufficient to establish general jurisdiction over petitioner. Instead, petitioner argued only that (1) MBUSA's contacts could not be considered because it was not petitioner's "agent" within the meaning of the Ninth Circuit's relevant precedent; and (2) "even if there were evidence that it had sufficient contacts with California, it would nonetheless be unreasonable to assert personal jurisdiction in this case." Def. Reply 5, 11.

Although the district court found the question a "close one," it granted petitioner's motion. Pet. App. 15a-17a.

3. Respondents appealed, arguing, among other things, that petitioner "should be subject to personal jurisdiction in California because it engages in 'continuous and systematic' business operations in California via its agent, MBUSA, sufficient for a finding of general jurisdiction." Resp. C.A. Br. 13.

In response, petitioner again did not question the assertion that if MBUSA's contacts were properly considered they would be sufficient to establish general jurisdiction over petitioner, even if

petitioner's place of incorporation or principal place of business were in Germany. Instead, petitioner argued only that MBUSA's contacts should not be considered because "[u]nder the proper test, plaintiffs do not have sufficient basis to impute the contacts of MBUSA" to petitioner. Petr. C.A. Br. 18.

The court of appeals reversed. It first addressed whether MBUSA's contacts were appropriately considered in support of jurisdiction over its parent company. It concluded that they were, for two basic reasons. First, MBUSA "functions as [its] parent corporation's representative" in the forum, Pet. App. 21a (citation omitted), given the importance of the services it performed there for petitioner. *Id.* 25a. "MBUSA's sales in California alone accounted for 2.4% of [petitioner's] total worldwide sales." *Id.*

Second, MBUSA's contacts were properly considered because petitioner enjoyed the "right to control nearly every aspect" of its subsidiary's operations. Pet. App. 23a. Petitioner's chairman, Dieter Zetsche, also served as chairman of MBUSA. *Id.* 11a. Moreover, under the companies' General Distributor Agreement, MBUSA could not replace key personnel, alter its management control or ownership interests, change its name or the form of its legal entity, or move the location of its principal place of business without petitioner's approval. *Id.* 11a, 13a. Petitioner also retained the right to unilaterally set the prices at which MBUSA sold vehicles and to specify the amount of working capital MBUSA must maintain. *Id.* 13a-14a. Its control extended even to minute aspects of MBUSA's operations, including the "type, design and size" of

any signs used by MBUSA. *Id.* 13a (internal quotation marks omitted).

Finally, the Ninth Circuit held, even if the agency test is met, the court must still independently determine "whether the assertion of jurisdiction is 'reasonable.'" *Id.* 30a. Among other things, the court considered that petitioner had "purposefully and extensively interjected itself into the California market through MBUSA," and had itself engaged in litigation in the state, established a research and development center in Palo Alto, and listed itself on the Pacific Stock Exchange in San Francisco. *Id.* 31a-32a. The court further explained that it would not be a significant burden on petitioner to litigate in California, since "technological advances" have lessened the cost for a multinational corporation to litigate there and because petitioner already had permanent counsel in California. *Id.* 32a-33a. Nor would the litigation pose a sufficient conflict with German sovereignty, given that petitioner had "manifested an intent to serve and to benefit from the United States market," which accounted for "nearly 50% of [petitioner's] overall revenue" and "1% of [Germany's] GDP." *Id.* 33a-34a (internal quotation marks and citations omitted).

The court furthermore concluded that California had "a significant interest in adjudicating the suit." *Id.* 35a. The court emphasized that although the case involved foreign parties and foreign conduct, "American federal courts . . . have a strong interest in adjudicating and redressing international human rights abuses," pointing out that respondents raised claims under the ATS and TVPA. *Id.* 36a.

The court also considered whether Argentina or Germany would provide an alternative forum. The court held that respondents bore "the burden of proving the unavailability of an alternative forum." *Id.* 38a (internal quotation marks and citation omitted). It concluded, however, that respondents met that burden with respect to Argentina because, among other reasons, a recent decision of the Supreme Court of Argentina had held that "human rights civil cases arising out of the Dirty War are subject to a two-year and three-month statute of limitations" that had long expired. *Id.* With respect to Germany, there was "conflicting expert testimony about whether equitable tolling, or an equivalent within the German legal system, would allow the suit to proceed." *Id.* 40a. But even assuming that this dispute should be resolved in petitioner's favor, the court concluded that petitioner had not sustained its burden of demonstrating that the exercise of jurisdiction would be so unreasonable as to violate the Constitution. *Id.* 41a-43a.

4. The full court denied petitioner's petition for rehearing en banc on November 9, 2011. Pet. App. 134a-35a.

5. Petitioner sought certiorari. The petition was initially held pending this Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Five days after issuing its decision in *Kiobel*, the Court granted this petition. 133 S. Ct. 1995 (2013).

SUMMARY OF THE ARGUMENT

I. Deciding whether a court may constitutionally exercise personal jurisdiction over a defendant requires three inquires: (1) what contacts are relevant to the analysis (including, as here, whether the contacts of a wholly owned subsidiary may be taken into account); (2) are those relevant contacts sufficient to support the particular kind of jurisdiction asserted (*i.e.*, specific or general); and (3) whether the exercise of jurisdiction was reasonable in this case. Petitioner preserved below, and raises here, only questions regarding the first and third steps.

II. Petitioner argues that a subsidiary's contacts are not even *relevant* to the Due Process analysis unless the two companies are "alter egos," meaning that they would satisfy the corporate veil piercing test of whatever state's law applied to the case under the forum's choice-of-law principles. That is wrong for several reasons.

First, the case presents a question of federal constitutional law, which should be resolved by adopting a federal rule (not state law) establishing the outer limits of states' authority to disregard corporate formalities for jurisdictional purposes.

Second, petitioner itself ultimately admits that the Court has applied the concept of "agency," not alter ego, in deciding whether a legally distinct entity's contacts are relevant to the "minimum contacts" analysis. Petitioner argues that the Court should limit that agency test to the specific jurisdiction context. But there is no reason for this Court to apply different attribution rules for different kinds of jurisdiction. Those differences are taken into

account at the second stage of the analysis, where a court must decide whether the nature and quantity of contacts supports the type of jurisdiction asserted.

Third, the alter ego test would be an inappropriate constitutional standard even if limited to general jurisdiction cases. The test is not tailored to the purposes of the Due Process clause and is inconsistent with this Court's deliberate abandonment of formalism in its Due Process analysis.

Fourth, it is no answer to claim that the alter ego test is deeply embedded in our legal system. It is not, and never has been. Even today, there are many less restrictive tests under which corporate distinctions are disregarded for various purposes in state or federal law. And at the time the Fourteenth Amendment was ratified, the alter ego test (and, indeed, limited liability corporations) were relatively new. No one would have thought the Due Process clause would significantly limit states' leeway in deciding when to disregard corporate formalities.

Finally, petitioner's policy objections are more appropriately addressed to Congress. While general jurisdiction over foreign corporations doing business in this country may be unpopular abroad, and may in fact be unwise, the judicial task here is to define the outer boundaries of legislative authority, not to develop a common law rule through the exercise of judicial policymaking judgment.

III. The California contacts of petitioner's wholly owned subsidiary were properly considered in this case. There is no dispute that MBUSA's contacts would be relevant if it were a subdivision of petitioner, rather than a subsidiary. A state is

justified in disregarding the formal distinction between subdivisions and subsidiaries at least when, as here, the subsidiary is wholly owned by the defendant, performs an important part of the defendant's business in the forum, and is subject to the parent's substantial control. In such cases, the defendant enjoys the lion's share of the benefits of operating a subdivision in the forum because it retains all of the profits and most of the control.

IV. The Court should also reject petitioner's request for a per se reasonableness rule gerrymandered to the facts of this case. The Court has emphasized time and again that the Due Process analysis is not susceptible to mechanical operations, but must instead proceed on a case-by-case basis.

Nor should the Court entertain petitioner's request for fact-bound review of the court of appeals' case-specific reasonableness determination. Instead, the Court should remand the case. In finding the exercise of jurisdiction sufficiently reasonable, the court of appeals relied in part on the fact that respondents brought federal claims under the ATS and TVPA. Petitioner has argued that those claims have been extinguished by this Court's intervening decisions in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) and *Mohamed v. Palestinian Authority*, 132 S. Ct. 1702 (2012). The lower courts should be permitted to decide how these decisions affect the reasonableness calculus.

If the court were to reach the question, it should uphold the court of appeals' determination that the exercise of jurisdiction was reasonable on the facts of this case.

ARGUMENT

The court of appeals correctly concluded that the California contacts of petitioner's wholly owned subsidiary were appropriately considered as part of the broader Due Process personal jurisdiction analysis. At the same time, the court rightly perceived that exercising personal jurisdiction over petitioner on the basis of those contacts was not rendered per se unconstitutional simply because the claim arose abroad.

Nonetheless, the Court should vacate the judgment and remand the case to allow the court of appeals to reconsider its reasonableness analysis in light of this Court's intervening decisions in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and *Mohamed v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

I. This Case Presents No Question Regarding What It Means For A Corporate Defendant To Be "At Home" Within The Meaning Of The Court's General Jurisdiction Cases.

Deciding whether an exercise of personal jurisdiction comports with the Due Process Clause requires three distinct inquiries:

1. *Relevancy*. The court first must decide what contacts with the forum are relevant.[2]
2. *Sufficiency*. Having collected the relevant contacts, the court must decide

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[2] *See, e.g.*, *Rush v. Savchuk*, 444 U.S. 320, 328-29 (1980).

whether those contacts are sufficient (that is, whether they constitute the constitutionally required "minimum contacts") for the type of jurisdiction being asserted.[3]

3. *Reasonableness.* If the contacts are sufficient, the defendant may defeat jurisdiction by "mak[ing] a compelling case that the presence of some other considerations would render jurisdiction unreasonable" to such an extent that exercising jurisdiction would violate the Due Process Clause.[4]

This case involves only the first and third inquiries – when are the contacts of a wholly owned subsidiary relevant to establishing the minimum contacts of its parent, and is the exercise of jurisdiction in cases like this constitutionally unreasonable? Petitioner has not raised or preserved any question regarding the second "sufficiency" step of the analysis. To the contrary, in the lower courts, petitioner accepted that if MBUSA's contacts were properly considered, they were sufficient to subject petitioner to general jurisdiction. *See* Pet. App. 7a-8a, 113a; *supra* 5-6. The United States questions whether that concession was correct, U.S. Br. 14-18, and petitioner's new counsel (retained after the panel decision) tries to walk it back, Petr. Br. 31-32 n.5, but

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[3] *See, e.g., Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-18 (1945).

[4] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

there can be no question that the argument has been forfeited. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011).

This is important because the proper test for general jurisdiction – *i.e.*, what kinds and quantities of contacts are needed to establish general jurisdiction – is one of great significance and controversy. The Ninth Circuit decided this case on the established understanding, shared by many lower courts, that general jurisdiction is permitted so long as a corporation conducts a sufficiently substantial, systemic, and continuous course of business in the forum. *See* Pet. App. 20a-21a.[5] Although petitioner openly embraced that standard below,[6] it now takes a

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[5] *See, e.g.*, Meir Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. Rev. 671, 675 (2012) (noting that "lower courts [have] widely embraced the notion that any corporation 'doing business' in a state [is] subject to general jurisdiction there"); 4A FED. PRAC. & PROC. CIV. § 1069.2 (3d ed.) (same); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2)(h) (1987) (identifying as reasonable the exercise of jurisdiction over a corporation that "regularly carries on business in the state").

That understanding forms the basis of state long-arm statutes as well. *See, e.g.*, 735 Ill. Comp. Stat. 5/2–209(b)(4); Miss. Code Ann. § 13–3–57; Tex. Civ. Prac. & Rem. § 17.042; *see also Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (applying New York law); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510 (D.C. Cir. 2002) (applying District of Columbia statute).

[6] *See, e.g.*, Petr. C.A. Br. 5-6 (question is whether petitioner's contact "are so 'continuous and systematic' as to 'approximate physical presence' in California") (quoting

very different position in this Court. Petitioner repeatedly quotes the Court's recent statement in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), that general jurisdiction is appropriate when a "corporation's contacts with the forum state are 'so continuous and systematic as to render [it] essentially at home in the forum State.'" Petr. Br. 14 (quoting 131 S. Ct. at 2851). It claims that by using the phrase "at home," the Court has now "limit[ed] the number of jurisdictions in which a corporate defendant is subject to general personal jurisdiction," perhaps to only the "States in which the defendant is incorporated and has its corporate headquarters." Petr. Br. 16; *see also* Chamber Br. § I. Indeed, establishing that premise is the only function of the first section of its brief, which nominally addresses a point petitioner ultimately acknowledges is uncontested. *See* Petr. Br. 14-17. And this understanding of what it means for a corporation to be "at home," forms the premise for much of its briefing on the actual questions presented by the case. *See infra*, at 27.

This Court should reject any effort (direct or subtle) to provoke a decision on the standard for general jurisdiction. Any such argument was forfeited below and not adequately raised in the petition for certiorari. Nor has the question percolated in the lower courts since this Court's decision in *Goodyear* two terms ago. And neither the parties nor the Government has adequately briefed

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Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 807 (9th Cir. 2004)).

the issue. *See* U.S. Br. 13-18 (offering general musings but no firm conclusions).[7]

Accordingly, the Court should decide the relevancy and reasonableness questions on the premise upon which the case was litigated below, accepting for purposes of its decision that a state may exercise general jurisdiction over a corporation that

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[7] Space does not permit respondents to undertake a full defense of the court of appeals' general jurisdiction standard but we will make two points. First, although a person or a corporation's "home" may be the "paradigm forum for the exercise of general jurisdiction," *Goodyear*, 131 S. Ct. at 2853, it is clearly not the only such forum. An individual is *also* subject to general jurisdiction wherever she is physically present and served with process. *See Burnham v. Superior Court of Cal., Cnty. of Marin*, 495 U.S. 604, 610-19 (1990). And this Court has long been guided by the principle that for jurisdictional purposes, corporations should be put "upon the same footing as natural persons," treated no worse, but also no better. *Barrow Steamship Co. v. Kane*, 170 U.S. 100, 106 (1898). Second, the arguments in favor of narrow general jurisdiction cannot be squared with this Court's prior statements and examples of paradigmatic general jurisdiction cases. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447 (1952) (asking "whether, as a matter of federal due process, the *business done* in Ohio by [the defendant] was sufficiently substantial and of such a nature as to permit Ohio" to exercise general jurisdiction) (emphasis added); *id* at 446 & n.6 (citing as example of the proper exercise of general jurisdiction, *Tauza v. Sesquehana Coal Co.*, 115 N.E. 915 (N.Y. 1917) (Cardozo, J.) (upholding general jurisdiction based on a Pennsylvania mining company's maintenance of a sales office in New York) and *Barrow*, 170 U.S. at 100 (general jurisdiction in New York against British company on claim by New Jersey resident arising in Ireland, based on defendant's maintenance of shipping office in New York)); *Int'l Shoe*, 326 U.S. at 318 (citing *Tauza*).

engages in a substantial, continuous, and systematic course of business in the forum.[8]

If this Court thinks it would be unwise or overly artificial to handle this case this way, the Court should dismiss the case as improvidently granted. *See, e.g.*, *Adarand Constr., Inc. v. Mineta*, 534 U.S. 103, 105 (2001) (dismissing case when addressing the question upon which certiorari was granted "would require a threshold inquiry into issues" not preserved). Not only does the unbriefed antecedent question necessarily inform the resolution of the actual questions presented in the case, but it may render those questions entirely beside the point, as petitioner itself argues. Petr. Br. 31-32 n.5 (arguing that even if MBUSA's contacts are attributable to petitioner, there would be no general jurisdiction because petitioner "would still be a German corporation headquartered in Germany, and would still not be 'at home' in California.").

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[8] This Court held in *Goodyear* that "regularly occurring sales" of a defendant's product in the forum are insufficient to establish general jurisdiction when the products enter the forum through the stream of commerce. 131 S. Ct. at 2857 n.6. But the sales in that case were not undertaken by a wholly owned subsidiary of the defendant, *id.* at 2852, and the Court specifically declined to decide whether the sales would be relevant or sufficient if the distinctions between Goodyear's related companies were properly disregarded, *id.* at 2857.

II. State Law Alter Ego Tests Do Not Define The Constitutional Outer Limits Of States' Authority To Disregard Corporate Formalities For Purposes Of Exercising Personal Jurisdiction.

The first question in this case is one of constitutional relevancy – when are the contacts of a wholly owned subsidiary properly taken into account in the minimum contacts analysis. Although this relevancy question arises in a general jurisdiction case, it is not limited to that context. It can also arise in cases asserting specific jurisdiction on the basis of a subsidiary's contacts.[9]

Here, petitioner does not dispute that MBUSA's contacts would be relevant if it sold its vehicles in the United States through a sales division, rather than through a wholly owned subsidiary. The question here is under what circumstances is a state prohibited by the Due Process Clause from giving the same jurisdictional treatment to business conducted in the forum by the defendant's wholly owned subsidiary.

Although the question arises in a case with foreign parties concerning conduct that happened overseas, those facts are immaterial to the relevancy question addressed here. The constitutionality of an exercise of jurisdiction has "never been based on the plaintiff's relationship to the forum." *Goodyear*, 131 S. Ct. at 2857 n.5; *see also Keeton v. Hustler*

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[9] *See, e.g.*, *Jackson v. Tanfoglio Giuseppe, S.R.L.*, 615 F.3d 579, 586 (5th Cir. 2010); *Jet Wine & Spirits, Inc. v. Bacardi & Co. Ltd.*, 298 F.3d 1, 7-9 (1st Cir. 2002).

Magazine, 465 U.S. 770, 779 (1983) (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)). Likewise, the Due Process analysis draws no distinction between out-of-state and out-of-country defendants. *See Goodyear*, 131 S. Ct. at 2851 ("A court may assert general jurisdiction over foreign (*sister-state or foreign-country*) corporations . . . .") (emphasis added). Nor has the Court applied different tests depending on whether a claim arose across state lines or national borders. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984) (applying established general jurisdiction test to claims arising from plane crash in Peru).[10]

Accordingly, the Court's choice of a standard for attributing contacts will apply equally to a claim by a California resident against a Nevada company selling its products in Los Angeles through a wholly owned subsidiary, based on conduct occurring in the United States. Indeed, some of the cases in the circuit conflict involve suits by American plaintiffs against out-of-state American companies for claims arising in this country. *See, e.g.*, *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 575 (2011); *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 540 (7th Cir. 1998).

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[10] While these features of the case should have no bearing on the first step "relevancy" test, they may be considered at the final "reasonableness" determination. *See infra* § IV(C).

A. This Case Presents A Federal Constitutional Question Governed By Federal Constitutional Law.

We start with the basic question of whether the relevance of a subsidiary's contacts is a matter of state or federal law.

Respondents agree that the Court should not "constitutionalize fixed rules governing the attribution of contacts from one juridical person to another for jurisdictional purposes." U.S. Br. 21. The Constitution leaves it to the states (or, with respect to federal claims or claims in federal court, Congress) to adopt in the first instance the necessary rules for deciding when to respect or disregard corporate formalities for purposes of deciding whether to authorize jurisdiction over corporate defendants. *See id.* There is no doubt, for example, that California could adopt an alter ego test for jurisdictional purposes, or that this Court could do so for federal cases through an amendment to the Federal Rules.

It may be that, in some cases, a state will not have spoken to the attribution issue, giving rise to a question of statutory interpretation in which it might be appropriate to assume an intent to adopt some pre-existing state law standard from another context. *Cf.* U.S. Br. 28-29. But this case presents no such state law question. California's statute extends the personal jurisdiction to the fullest extent permitted by the Due Process Clause. Cal. Civ. Proc. Code § 410.10. That must be understood to adopt the broadest corporate attribution rule permitted by the Fourteenth Amendment. Certainly, that has been the understanding upon which this case has been

litigated, and petitioner does not argue otherwise here.

Instead, the question presented to this Court concerns the outer limits of the Due Process clause. *See* Pet. i. And although the Court has referred to state law to decide when the requirements of Due Process are triggered, and has afforded states leeway to decide how best to meet the Constitution's requirements, U.S. Br. 19-20, it has not looked to state law to provide the substantive constitutional limits against which state laws are ultimately judged. *See, e.g., Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (adopting federal "minimum contacts" rule); *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788-89 (2011) (plurality) (considering federal rule regarding "stream of commerce" contacts); *id.* at 2792 (Breyer, J., concurring in the judgment) (same); *Calder v. Jones*, 465 U.S. 783, 788-90 (1984) (applying federal rule for intentional torts directed at forum residents).

Petitioner nonetheless asserts in a footnote that the details of the constitutional alter ego test[11] it advances should be determined "through the forum State's choice-of-law rules" in order to "help ensure foreseeability." Petr. Br. 22 n.3. But it is difficult to fathom how requiring defendants to familiarize themselves with the choice of law rules of 50 states as well as the various versions of the veil piercing test those choice of law rules may ultimately adopt would

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[11] We understand petitioner's reference to "alter egos" to mean companies subject to veil piercing under the relevant corporate law standard.

be more predictable that adopting a single federal constitutional test.[12]

It is far better to follow the Court's traditional practice of establishing a federal rule to enforce the federal constitutional provision.

B. As Petitioner Ultimately Admits, The Due Process Clause Does Not Categorically Limit States To Applying Alter Ego Tests In Determining Whether To Disregard Formal Corporate Distinctions For Jurisdictional Purposes.

The search for a proper Due Process rule must begin with this Court's path-breaking decision in *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). There, the Court abandoned prior "hairsplitting legal technicalities" in favor of "practical, business conceptions." *United States v. Scophony Corp. of Am.*, 333 U.S. 795, 808 (1948). The ultimate question in each case, the Court declared, is whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. And the principal consideration, the Court held, was the degree to which the defendant "enjoys the benefits and protections of the laws of that state" by virtue of its

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[12] Indeed, in a case like this, it is entirely possible that choice of law rules would dictate application of foreign law, which might be very different from ours. *See, e.g.*, David M. Albert, *Addressing Abuse of the Corporate Entity in the People's Republic of China: New Thoughts on China's Need for a Defined Veil Piercing Doctrine*, 23 U. PA. J. INT'L ECON. L. 873 (2002).

"contacts" with the forum. *Id.* at 319. As applied to corporations, the Court recognized, the inquiry necessarily focuses on the defendant's agents. The "corporate personality is a fiction," the Court explained. *Id.* at 316. It can enjoy the benefits of, and establish contacts with, a forum "only by activities carried on *in its behalf* by those who are authorized to act for it." *Id.* (emphasis added).

It is common ground that a subsidiary can carry out activities "in behalf" of its parent company for purposes of this rule in some circumstances, but not others. The parties agree that attribution is not automatic. *See Keeton*, 465 U.S. at 781 n.13. But by the same token, all agree that a subsidiary should sometimes be viewed as acting on behalf of its parent in a way that makes its activities in the forum relevant for the minimum contacts analysis. *See* Petr. Br. 18, 24. The question is when?

Petitioner says only when the two corporations are alter egos of one another. It reminds the Court that "[e]ach defendant's contacts with the forum State must be assessed individually." *Id.* 20 (quoting *Keeton*, 465 U.S. at 781 n.13). From there it reasons that only when two corporations are essentially the same is it fair to say that the parent itself has established contacts with the forum. *Id.* 20-21.

But that reasoning ignores that the justification for exercising jurisdiction is that the defendant has enjoyed the benefits of the forum state's law and economy. And a corporation can enjoy those benefits through agents acting "in its behalf," *Int'l Shoe*, 326 U.S. at 316, even if those agents maintain a distinct existence from the defendant.

The facts of *International Shoe* itself illustrate the point. There, a company incorporated in Delaware wished to enjoy the benefit of selling its shoes to consumers in Washington state. But it contrived to enjoy those benefits without subjecting itself to jurisdiction or taxation in that state by contracting with salesmen who would solicit orders in the state, which were then sent for formal acceptance and fulfillment in Missouri. *Id.* at 313-14. When Washington sued the company for not paying unemployment compensation tax for the salesmen, the company argued that the salesmen were not its employees (which, it said, made the tax liability unconstitutional) and that there was no jurisdiction because the corporation itself was not present in the state. *Id.* at 312, 315. This Court, however, had no difficulty in concluding that the corporation had established sufficient contacts with the state through the activities of its agents to satisfy the Due Process clause. *Id.* at 320. The Court did not pause to decide whether the salesmen were properly considered employees or, as the defendant apparently argued, independent contractors. While that formal distinction might be important for some legal purposes, it made no difference to the minimum contacts analysis as a constitutional matter.

This Court has since made clear that a manufacturer like petitioner can subject itself to personal jurisdiction in a state through the acts of agents, including, for example, by "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 112 (1987) (O'Connor, J., joined by Chief Justice Rehnquist, and Justices Powell and

Scalia); *id.* at 117 (Brennan, J., joined by Justices White, Marshall, and Blackmun) (agreeing that such conduct is sufficient for jurisdiction); *see also Nicastro*, 131 S. Ct. at 2790 (plurality) (noting that manufacturer might be subject to specific jurisdiction in United States because it "directed marketing and sales efforts at the United States" undertaken by independent distributor); *id.* at 2801 (Ginsburg, J., dissenting) (same); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (explaining that jurisdiction may be premised on "the efforts of the manufacturer or distributor to serve directly *or indirectly*, the market for its product in other States") (emphasis added).

To hold otherwise would lead to intolerable evasions and gamesmanship. A "corporation should not be able to insulate itself from the jurisdiction of the states in which it does business by the simple expedient of separately incorporating its sales force and other operations in each state." *IDS Life Ins.*, 136 F.3d at 541. Yet that is exactly what an alter ego test permits. It would allow, for example, a foreign car manufacturer to evade jurisdiction in the United States for design defect claims through the simple expedient of spinning off its American sales division into a wholly owned subsidiary, even while it continued to enjoy the entirety of the economic benefits of participating in the American economy. That is precisely the kind of "artful arrangement of agents' authority" and "hairsplitting legal technicalities" this Court abandoned in *International Shoe*. *Scophony*, 333 U.S. at 808 n.19.

C. There Is No Basis For Adopting Different Attribution Rules For General And Specific Jurisdiction.

Twenty-four pages into its brief, petitioner ultimately agrees, acknowledging that this Court has embraced an agency – not an alter ego – test, at least in specific jurisdiction cases.[13] But, it insists, "this Court has never suggested that an agency relationship is sufficient to extend *general* personal jurisdiction over a foreign defendant." Petr. Br. 24-25 (emphasis in original). From this, it concludes that the Court has in fact limited the agency test to specific jurisdiction cases. *Id.* 25.

But that conclusion hardly follows. Throughout its brief, petitioner relies on Due Process principles established in specific jurisdiction cases (like *International Shoe* and *Keeton*), without questioning their application to the general jurisdiction context. Nor has petitioner provided any adequate doctrinal or practical reason for establishing different tests based on the nature of the jurisdiction asserted for deciding when a subsidiary's contacts are even *relevant*.

Petitioner says that "only an alter-ego test can provide defendants with the predictability mandated by due process." Petr. Br. 27. But why would an agency test be sufficiently predictable for specific jurisdiction cases, yet suddenly become

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[13] Petitioner did not favor this Court with such candor at the certiorari stage, where it – like the circuit cases it embraced – drew no distinction between the proper attribution test for specific and general jurisdiction. *See* Pet. 20-24.

incomprehensible when applied to a general jurisdiction case? Petitioner does not say.

Instead, petitioner argues that only an alter ego test can ensure that defendants "are subject to general jurisdiction only in those States in which their own jurisdictional contacts are so significant as to render them 'at home.'" *Id.* 27 (quoting *Goodyear*, 131 S. Ct. at 2851). But that does not follow either. If, as petitioner agreed below, a state may legitimately exercise general jurisdiction over a corporation conducting a substantial, systemic, and continuous course of business in the state, *see supra* 14-15, there is no reason why a company cannot carry out some of the relevant activities – for example, as here, selling its products – through representatives. To the extent petitioner means, instead, that only an alter ego test is consistent with some new, much narrower conception of general jurisdiction growing out of *Goodyear*'s "at home" formulation, the premise of the argument is forfeited and never openly defended in petitioner's brief.

Rather than adopt different relevancy tests, the Court should apply an agency test in all cases, but allow courts to take into account the nature of the contact (including whether it is direct, through an alter ego, or through a wholly owned subsidiary) in assessing whether the contacts are sufficient for the type of jurisdiction asserted. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 319 (minimum contacts analysis must consider "the quality and nature of the activity"). To be sure, petitioner made a strategic choice to put all its eggs in the "relevancy" and "reasonableness" baskets, waiving any right to argue that MBUSA's contacts, even if relevant, are insufficient for general

jurisdiction. But that is no reason to distort the analytical framework that will apply to many cases after this.

D. Even If This Court Adopted A General Jurisdiction-Specific Rule, It Should Reject Petitioner's Alter Ego Standard.

Even if this Court were to adopt a relevancy rule applicable only to general jurisdiction cases, there is no basis for choosing petitioner's alter ego standard.

1. There Is No Support For Petitioner's Alter Ego Rule In This Court's Modern Due Process Precedents.

Petitioner identifies no decision of this Court adopting an alter ego test under the Due Process Clause. To the contrary, when confronted by Due Process objections to states' disregard of corporate formalities, this Court has applied a far more pragmatic approach.

To be sure, in certain statutory construction cases this Court has assumed that Congress intended to incorporate contemporary principles of corporate law into federal statutes, absent a reason to believe otherwise. *See* Petr. Br. 18-19. But the question here is one of constitutional law (not presumed congressional intent) and personal jurisdiction (not corporate liability). This Court has never suggested that the Constitution *requires* Congress (much less a state) to use particular conception of "corporate separateness" for liability purposes. Nor has it ever held that the Due Process Clause requires an alter ego test in the context of personal jurisdiction.

Petitioner suggests that this Court adopted a constitutional alter ego rule in *Cannon*

Manufacturing Co. v. Cudahy Packing Co., 267 U.S. 333 (1925). *See* Petr. Br. 19.[14] As the United States demonstrates (Br. 22-23), any such suggestion is baseless, as the Court in *Cannon* expressly disclaimed any constitutional basis for its decision. *See* 267 U.S. at 336. Indeed, the Court's observation that "Congress has not provided that a corporation of one state shall be amenable to suit in the federal court for another state in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein," *id.*, would have been entirely irrelevant if the Court believed that such a statute would be unconstitutional.

More importantly, in *International Shoe* this Court abandoned the strict formalism underlying *Cannon* and similar decisions of its era, in favor of a more pragmatic implementation of the Due Process Clause. In *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980), for example, this Court held that the Due Process clause permits states to disregard formal distinctions between parents and subsidiaries for tax purposes when the subsidiary's operations are not "distinct in any *business or economic* sense." *Id.* at 439 (emphasis added). "[T]he form of business organization," the Court explained, "may have nothing to do with the underlying unity or diversity of business enterprise."

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[14] Petitioner likewise implies that the Court adopted a veil piercing standard as a Due Process test for personal jurisdiction in *Goodyear*, *see* Petr. Br. 20, but the Court expressly declined to consider the issue. 131 S. Ct. at 2857.

Id. at 440. For example, had a company "chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those division would meet due process requirements for appropriationability." *Id.* at 441. "Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly" made no difference in the Due Process analysis. *Id.*

The same reasoning applies here. The Due Process clause does not force states to accept formal distinctions between subdivision and subsidiaries when the relevant economic reality supports the exercise of state authority.[15] When there is no distinction in "any business or economic sense" between selling cars in the state through a subsidiary or a subdivision, *Mobil Oil*, 445 U.S. at 439, the Constitution does not require states to recognize the distinction.

The alter ego test is thus singularly ill-suited to a modern Due Process inquiry. The test is not, as the United States claims, a state law standard for treating "two corporations as one *for all purposes*." U.S. Br. 30 (emphasis added). Instead, it is a

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[15] Although the power to tax and the power to subject a company to jurisdiction are distinct, this Court has recognized a logical connection between the two in assessing challenges to both kinds of state authority under the Due Process clause. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 321 (holding that same contacts that authorized state to assert jurisdiction established sufficient basis to impose a tax).

corporate law standard for allowing enforcement of a judgment against a corporation's owners. *See, e.g.*, STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1:1 (2011). As a consequence, it is tailored to determining when it is appropriate to disregard ordinary principles of corporate limited liability in light of the competing interests in promoting the basic purposes of the limited liability form, preventing fraud, and providing injured parties effective remedies. Accordingly, one of the essential inquiries under the alter ego test is whether the defendant not only disregarded corporate distinctions, but did so "to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *United States v. Bestfoods*, 524 U.S. 51, 62 (1998).

Those considerations have only passing relevance to Due Process limitations on personal jurisdiction. A corporation need not engage in fraud or act through a dummy subsidiary in order to take sufficient advantage of a state's markets and laws to warrant treating it like the state's other businesses for jurisdictional purposes.

2. *The Alter Ego Test Is Not So Deeply Embedded In Our Legal Traditions As To Have Attained Constitutional Status.*

Because the alter ego test is not adapted to the concerns of the Due Process Clause, it makes no difference whether its use for other purposes is deeply rooted "in American law and business." Petr. Br. 11. Moreover, the alter ego test is not now, nor has it ever been, the pervasive legal instrument for disregarding formal corporate distinctions.

a. The "law has developed a variety of doctrines supporting the attribution of the legal consequences" of a subsidiary's act to the parent. 1 BLUMBERG ON CORPORATE GROUPS § 10.01, at 10-4 (2d ed. 2012). Alter ego is one of them, but the United States' brief catalogs examples of others from a wide range of contexts. *See* U.S. Br. 26 & n.8. There are more as well. *See, e.g., Mobil Oil*, 445 U.S. at 439 (permitting states to apply a flexible "unitary-business principle" for taxation of subsidiaries' earnings).[16]

In the antitrust context, for example, the Court has "eschewed . . . formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2209 (2010). Thus, the Court has recognized that "although a parent corporation and its wholly owned subsidiary are 'separate' for the purposes of incorporation or formal title, they are

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[16] *See also, e.g., Engelhardt v. S.P. Richards Co., Inc.*, 472 F.3d 1, 4-7 (1st Cir. 2006) (applying an "integrated employer" test under the Family Medical Leave Act); *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d Cir. 2001) (under the Worker Adjustment and Retraining Notification Act, applying an "integrated enterprise test" which focuses on "economic realities as opposed to corporate formalities" and is "demonstrably easier on plaintiffs than traditional veil piercing."); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) (applying "integrated employer" test to enforcement of federal antidiscrimination statutes); *Murray v. Miner*, 74 F.3d 402, 404-05 (2d Cir. 1996) (applying "single employer doctrine" under state labor law); *see also* 26 U.S.C. § 1561 (applying a "controlled group" test to disregard corporate distinctions for purposes of certain tax benefits).

controlled by a single center of decisionmaking and they control a single aggregation of economic power." *Id.* at 2211. Accordingly, focusing on "substance, not form," the Court has ignored the distinction between the two for antitrust purposes. *Id.* (holding that parent and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act.") (citation omitted).

b. There is even less support for petitioner's alter ego rule in the broader history of the Due Process Clause. At the "crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted," *Burnham v. Super. Ct. of Cal., Cnty. of Marin*, 495 U.S. 604, 611 (1990), the alter ego doctrine was only just emerging. *See* I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 156 (1912) (identifying an 1865 case as "one of the earliest in point"). Doing business through the corporate form was still a relatively new phenomenon. *See* U.S. Br. 21. The features of early corporations were highly variable, in part because incorporation often required a special act of the state legislature, which fixed the attributes of corporate charters on a case-by-case basis. *See* Handlin & Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 9-10 (1945).

In those days, limited liability (the premise of the alter ego doctrine) was a relatively recent, controversial, and far from universal feature. *See, e.g.*, RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 49-55 (1982); E. MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, 387-88 (1954). For example, Massachusetts and Pennsylvania had statutes

imposing unlimited liability on manufacturing corporations. DODD, *supra* at 387-88. And an 1848 New York statute made railroad stockholders fully liable for unpaid wages. SEAVOY, *supra* at 203.

At the same time, wholly owned subsidiaries were new and uncommon. As the United States notes, the first statute generally permitting stock ownership by corporations was not enacted until after ratification. U.S. Br. 21. In fact, at the time the Fourteenth Amendment was ratified, many states prohibited corporations from having wholly owned subsidiaries. *See* William R. Compton, *Early History of Stock Ownership by Corporations*, 2 GEO. WASH. L. REV. 125, 130 (1940); SEAVOY, *supra* at 195.

Accordingly, there is simply no historical basis for any claim that "corporate separateness" between parent companies and subsidiaries, much less the alter ego test, was such an essential feature of our legal system that those who enacted the Fourteenth Amendment would have thought the topic beyond the reach of state legislatures. Quite to the contrary, they would have believed that the Constitution leaves the formation, nature, and treatment of corporate relationships to the political process.

3. Petitioner's Policy Objections Are No Basis For Judicial Imposition Of An Alter Ego Test.

Petitioner and its *amici* argue at length that a narrow alter ego test is required to mitigate a host of predicted policy ills. While those arguments are a perfectly appropriate basis for limiting general jurisdiction through legislation, treaties, or amendments to the Federal Rules, they are not a

ground for this Court to impose an alter ego test upon the political branches.

To start, we should be frank about the source of the policy objections and international friction. It is not the rules for disregarding corporate distinctions for jurisdictional purposes.[17] What "places the United States courts out of step with international jurisdictional standards," Petr. Br. 36, is the American tradition of general jurisdiction over corporations based on their doing business in a state. *See, e.g.*, Freidrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 161-62 (2002). But the continuing viability of that practice is not before the Court. And while the potential for international friction may be an appropriate consideration in construing ambiguous statutes (*see, e.g.*, *Kiobel*, 133 S. Ct. at 1664), international opposition to American legal tradition is not an appropriate basis for constitutional decision making.

The politically accountable branches have ample authority – and the constitutional responsibility – for addressing the policy and diplomatic objections petitioner raises. Even if there were reason to worry that states might take too narrow a view of the national interest, Congress plainly has the authority to intervene and preclude by legislation exercises of state jurisdiction that interferes with international

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[17] *See, e.g.*, Collyn A. Peddie, *Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations After* Goodyear Dunlop Tires Operations, S.A. v. Brown, 63 S.C. L. REV. 697, 723 (2012).

commerce. *See Pierce Cnty. v. Guillen*, 537 U.S. 129, 147-48 (2003). And, of course, Congress has plenary authority over the jurisdiction of the lower federal courts. *See* U.S. Const. art. III, § 1. Indeed, this Court itself could address concerns about excessive exercises of general jurisdiction by federal courts through its role in the promulgation of the Federal Rules. That process should not be short-circuited by resorting to constitutional litigation.

III. The Court Of Appeals Correctly Concluded That MBUSA Was Petitioner's Agent For Purposes Of Attributing Contacts.

The court of appeals also rightly concluded that MBUSA's California contacts were relevant to assessing petitioner's amenability to general jurisdiction in that State.

A. The Due Process Clause Permits Consideration Of The Contacts Of A Wholly Owned Subsidiary Performing Important Services For The Defendant While Subject To Its Significant Control.

The forum contacts of a wholly owned subsidiary are properly considered as part of the Due Process analysis when the subsidiary performs important services for the defendant while subject to its significant control.

1. The purpose of the Due Process inquiry is to ensure that exercising jurisdiction over the defendant is consistent with traditional notions of fair play and substantial justice. *See Int'l Shoe*, 326 U.S. at 316. Traditionally, it has been recognized as fair to require a defendant that has taken advantage of the

forum's laws and economy to shoulder the reciprocal obligation of submission to its courts. *See, e.g., id.* at 319; *Barrow*, 170 U.S. at 107. While defendants are entitled to sufficient notice of the jurisdictional consequences of their actions so they can "structure their primary conduct" to avoid unwanted exposure to jurisdiction, *World-Wide Volkswagen*, 444 U.S. at 297, they are not entitled to enjoy the real economic benefits of participating in a forum's economy while altering their activities in only a formal sense to avoid jurisdiction. *See Int'l Shoe,* 326 U.S. at 319-20.

Of course, businesses can take advantage of a forum in various ways and to varying degrees. The appropriate agency test should aim to distinguish between two cases, the results of which should be reasonably uncontroversial. At the one extreme, a corporation can do business in the forum directly, through a branch office or subdivision. Petitioner does not dispute that the activities of a division are appropriately attributed to the parent, even if the parent gives the office a different name or treats it for internal purposes as a distinct entity. At the other end of the spectrum, a corporation does not itself participate in the economy of a forum simply by selling its products to a wholly separate and independent third party that resells the products in the forum. The contacts of Wal-Mart in Michigan are not attributable to Apple simply because Wal-Mart sells Apple products there.

The critical difference between these two extremes is the degree of benefit realized by, and control retained by, the defendant corporation. When a manufacturer sells its own goods in a forum, it reaps the entirety of the economic benefit of the sales.

At the same time, by selling the products itself, the company avoids placing a substantial part of its economic success in the hands of a third party over which it has no control. On the other hand, when a manufacturer sells its goods to an independent dealer, it gives up both the right of sole benefit and a great deal of control. But in exchange, the corporation avoids the financial and other risks of operating a sales office in the forum.

There should be no question that these differences in ownership and control are material to businesses in the real world. In this case, for example, petitioner created MBUSA to sell its cars in the United States after it experienced disappointing sales through independent third party distributors. *See* Pet. App. 8a.

2. In light of the foregoing principles, we submit that at the very least, a court may appropriately consider, as part of the overall minimum contacts analysis, the contacts of a corporate defendant's subsidiary when the subsidiary (1) is wholly owned by the defendant; (2) undertakes an important part of the defendant's business in the forum; (3) exclusively for the defendant; and (4) does so while subject to substantial control by its owner.

Wholly Owned Subsidiary. Although the court of appeals did not expressly limit its rule to wholly owned subsidiaries, the fact that MBUSA is wholly owned by petitioner substantially weighs in favor of attributing its contacts to its parent. A parent company necessarily enjoys the benefits of a wholly owned subsidiary's participation in a forum's economy for the simple reason that the parent is entitled to all of the profits of the venture and all the

value that accumulates in the business, were it ever to be sold. At the same time, the parent's ability to ensure that the sales are conducted in the way it prefers is greatly enhanced by its sole ownership of the subsidiary. *See, e.g.*, *Am. Needle*, 130 S. Ct. at 2212 (parents and wholly owned subsidiaries "have a complete unity of interests and thus with or without a formal agreement, the subsidiary acts for the benefit of the parent, its sole shareholder") (internal quotations omitted); 19 C.J.S. CORPORATIONS § 562 (2013) (noting that wholly owned subsidiaries owe a fiduciary duty to their parents).

Performing An Important Part Of The Defendant's Business In The Forum. The fairness of considering a subsidiary's contacts is enhanced when the subsidiary undertakes an important part of the defendant's business in the forum. *Cf. Mobil Oil Co.*, 445 U.S. at 440 (Due Process clause permits states to treat dividends from wholly owned subsidiaries as earnings for the parent when they "reflect profits derived from a functionally integrated enterprise").

Here, it is incontestable that by selling petitioner's product in one of its biggest markets, MBUSA was engaged in a critically important part of petitioner's enterprise. There is no point in making cars if you cannot sell them.[18] On the other hand, if a

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[18] The Ninth Circuit has implemented the importance requirement by asking whether the parent would otherwise undertake the subsidiary's task itself or through another third party. Pet. App. 24a & n.13. We do not believe that this gloss is particularly helpful.

company simply owns an unrelated business – if, for example, petitioner bought a paper mill as an investment – it would not be appropriate to consider that unrelated company's contacts.

Exclusively Serving The Defendant. A defendant's ability to benefit from, and effectively control, a subsidiary's forum activities is further enhanced when, as in this case, the subsidiary provides its services exclusively for the parent, avoiding the prospect of competing loyalties.

Subject To Substantial Control. When a parent retains significant control over the operations of a subsidiary, beyond that incident to its status as a stockholder, it substantially erodes the other principal difference between subsidiaries and subdivisions – the extent of the corporation's control over operations in the forum.

As reflected in traditional agency law, it is enough that the parent company retains the right of substantial control; actual exercise of that control need not be proven. *See* RESTATEMENT (THIRD) AGENCY § 1.01 cmt. c. As a practical matter, one need not overtly direct an agent's conduct in order to ensure that the agent conducts himself in the way the principal prefers. The facts of this case illustrate the point.

Here, petitioner's control, and right to control, MBUSA were pervasive. Petitioner not only selected its subsidiary's board of directors (installing its own Chairman as Chairman of MBUSA as well, Pet. App. 11a), but also approved MBUSA's top managers. *Id.* 10a-11a. MBUSA further required petitioner's approval of any replacements on the management team. *Id.* 10a-11a, 13a. When one selects the

decision makers, exercising detailed control over the subsidiary's day-to-day decisions is less important.

Nonetheless, petitioner retained control of large swaths of MBUSA's basic operations in other ways as well. For example, under its General Distributor Agreement, MBUSA had to pay whatever price petitioner set for its vehicles. *Id.* 13a. At the same time, petitioner retained the right to modify the prices MBUSA charged its own customers. *Id.* And MBUSA was required to make "any changes or adjustments" to its sales network that petitioner deemed advisable. *Id.* 9a.

Petitioner also exercised pervasive control over how MBUSA conducted its day-to-day operations by requiring the subsidiary to comply with detailed Dealership Standards, manuals, and guidelines. *Id.* 10a-11a. Petitioner further retained the right to change those documents at any time, *id.*, and to issue additional directives, with which MBUSA was obligated to comply, *id.* 10a.

Even when petitioner was not directly telling MBUSA how to conduct its operations, it required the subsidiary to seek its approval of such basic business decisions as sales targets, what dealerships to sell its cars to, what information to collect about its customers, what accounting and other business systems to use, and how big its signs should be. *Id.* 9a-10a, 13a.

* * * * *

In these circumstances, the practical difference between subsidiary and subdivision is minimal. At the very least, there should be no question that petitioner obtained sufficient benefit from, and retained sufficient control over, MBUSA's California

business activities that it would be fair to at least take MBUSA's forum contacts *into account* in the minimum contacts analysis.

B. Petitioner's Objections Are Meritless.

Petitioner's objections to allowing a state to consider a subsidiary's contacts in such circumstances are meritless.

Not an Alter Ego Test. Petitioner first argues that the only acceptable agency rule is one that effectively applies an alter ego test. If the Court adopts an agency rule, petitioner argues, it should require a "bona fide agency relationship sufficient to pierce the corporate veil under applicable agency principles." Petr. Br. 27. Specifically, the foreign defendant must "exercise pervasive and total control over the in-state agent's day-to-day operations." *Id.* 28. "Only in such circumstances is the agency relationship sufficient to pierce the corporate veil between the principal and agent." *Id.*

It should be transparent that the "agency" rule petitioner proposes is simply a repackaged alter ego test. Moreover, there is no merit to petitioner's attempt to portray the alter ego test as part of agency law. Quite to the contrary, piercing the corporate veil is a rule of corporate law. Under agency law, a principal is automatically liable for most acts of the agent within the scope of his agency; there is no requirement of effective identity between the two. *See, e.g.*, RESTATEMENT (THIRD) AGENCY §§ 2.04, 7.08. And under agency law, all that is required to establish vicarious liability is a "right to control" – actual exercise of control (much less "pervasive and total" actual control) is not required. *See id.* § 1.10 cmt. c.

Not A Common Law Agency Test. Having just urged the Court to adopt an "agency" test that has little to do with common law agency principles, petitioner faults the Ninth Circuit for adopting a rule that does not duplicate traditional common law agency in every detail. That objection has no merit. While a state surely could choose to apply a common law agency test for jurisdictional purposes, the Due Process Clause does not require it. Like the alter ego test, the common law of agency was not developed with personal jurisdiction (much less Due Process constraints on personal jurisdiction) in mind. And, as discussed earlier, legislatures and this Court have regularly applied legal tests substantially departing from agency law principles in various contexts. *See, e.g.*, *Am. Needle*, 130 S. Ct. at 2211-12 (antitrust). Nor has this Court construed the Due Process clause to require states to apply a common law agency test to parent companies and their subsidiaries for tax purposes. *See, e.g.*, *Mobil Oil*, 445 U.S. at 440-41.

The test advanced here appropriately focuses on the features of agency law most pertinent to the underlying concerns of the Due Process Clause in this context. That is sufficient.[19]

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[19] The United States seems to argue that the Due Process attribution rule must duplicate *some* pre-existing legal standard that "governs the subsidiary-parent relationship more generally." U.S. Br. 32. But as noted, this Court has imposed no such requirement in the tax context, where predictability is also important. Moreover, none of the other parts of this Court's personal jurisdiction test duplicate existing legal standards. To the contrary, companies' "expectations" about the "jurisdictional consequences" of their methods of operations, *id.*, must be set by

Insufficiently Predictable. Petitioner further claims that only an alter ego test "provides the predictability necessary for due process." Petr. Br. 21. Not so.

It is not difficult to decide whether a subsidiary is wholly owned or whether it serves only the parent company. The concept of retaining a right to control the subsidiary's operations is taken directly from the common law of agency, which petitioner admits is familiar to corporate defendants. *Id.* 27-28. And while petitioner complains that the requirement that the subsidiary perform a sufficiently important task for the defendant is insufficiently limiting, *id.* 32-33, importance is a common standard in the law, comparable to other considerations already a part of the Due Process analysis. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (requiring courts to consider the strength of the forum's interest in adjudicating the dispute).

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reference to this Court's "minimum contacts" and "reasonableness" tests. That is because such tests serve to set the outer boundary of states' and Congress's legislative authority, a function that defies the drawing of arbitrary, bright line rules. To be sure, the Due Process limit functions as the operative jurisdictional rule in this case, but only because this Court has allowed states to adopt jurisdictional statutes that simply embrace the constitutional outer limit, and because this Court has seen fit to incorporate those statutes by reference for most suits in federal court. In any event, as discussed next, the constitutional rule respondents propose is sufficiently predictable.

At the same time, the rule respondents propose allows corporations to "structure their primary conduct" to avoid unwanted exposure to jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 297; *see also* Chamber Br. 29 (urging Court to establish "a set of safe-harbor factors"). Petitioner could confidently avoid general jurisdiction in the United States by selling its cars to a truly independent third party distributor, as Toyota and many other foreign companies do. *See* Pet. App. 49a. To be sure, petitioner would thereby give up some of the benefits and control it exercises by using a wholly owned subsidiary over which it retains substantial operational authority. But that is the quid pro quo the Due Process Clause permits a state to demand of those who would seek to participate in its economy.

In any event, respondents' rule is no more vague or less predictable than other tests this Court has adopted to implement the Due Process Clause. *See, e.g., Int'l Shoe*, 326 U.S. at 316 ("minimum contacts"); *id.* at 317 ("continuous and systematic" activities); *id.* at 318 ("continuous corporate operations . . . so substantial and of such a nature as to justify" general jurisdiction). The Court has recognized that under these flexible standards "few answers will be written 'in black and white.'" *Kulko v. Cal. Super. Ct. of Cal. In & For City & Cnty. of San Francisco*, 436 U.S. 84, 92 (1978) (citation omitted). Instead, the "greys are dominant and even among them the shades are innumerable." *Estin v. Estin*, 334 U.S. 541, 545 (1948).

Finally, petitioner's alternate alter ego test is itself notoriously unpredictable in application. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel,

Limited Liability and the Corporation, 52 U. CHI. L. REV. 89, 89 (1985) (likening veil piercing under the alter ego test to lightning strikes, in that both are "rare, severe, and unprincipled"); Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 84 (2011) ("The inherent imprecision in metaphors has resulted in a doctrinal mess. Courts have resorted to compiling ever-expanding lists of ex post fact-specific factors, no one of which is dispositive or necessarily connected to the underlying harm."). That unpredictability is only multiplied by petitioner's claim that the Constitution adopts whatever alter ego formulation is dictated by the forum's choice of law rules. Petr. Br. 22 n.3

Sweeps Too Broadly. Petitioner and its *amici* complain that an agency test sweeps too broadly, potentially subjecting out-of-state corporations to jurisdiction wherever "they have distributors, independent contractors, or other ordinary business relationships." *Id.* 31. Again, not so. Under the rule respondents advance, contacts are deemed constitutionally relevant only when the business partner is a wholly owned subsidiary, performing important services for the defendant while subject to the parent's substantial control. That rule obviously excludes ordinary independent third party businesses, like independent distributors.

Moreover, the rule will not sweep in "virtually every case involving a parent and subsidiary," on the theory that a "corporate parent always has the *right* to control a subsidiary" by virtue of its ownership of the subsidiary's stock. Petr. Br. 33. The test requires, and petitioner exercised here, a degree of control far beyond rights, like the power to elect directors, that are "incident to the legal status of

stockholders." *Id.* (internal quotation marks and citation omitted). If those ownership rights were as comprehensive as petitioner pretends, *id.*, it would not have needed its detailed contract with MBUSA.

Petitioner nonetheless asserts that "the distribution agreement in this case is typical of relationships between foreign parent companies and domestic subsidiaries." *Id.* 31. The four cases it cites for this assertion, *id.*, certainly do not support it; none describes a retained right of control anything like the one reflected in this record. But in any event, even if petitioner is right, the fact that corporations have structured themselves to maximize their control over, and benefit from, market activities here, while also seeking to avoid jurisdiction is neither surprising nor a reason to conclude that the Constitution gives them the right to continue to reap those benefits while avoiding the responsibilities associated with doing business here.

Finally, petitioner's objection ignores that the relevance test is only one part of the overall Due Process analysis. Attributing contacts only means that the contacts are appropriately *considered*. The court still must decide whether the aggregate contacts are sufficient to warrant the exercise of general jurisdiction. *See* Petr. Br. 31 n.5 (acknowledging as much).

IV. The Court Should Reject Petitioner's Reasonableness Challenge.

Petitioner makes two reasonableness arguments. First, it devotes two paragraphs of its brief to urging this Court to adopt a per se rule holding that general jurisdiction is *never* permitted over a foreign defendant, for foreign conduct, based solely on its

relationship with an uninvolved domestic entity. Petr. Br. 37-38. Second, it argues that the exercise of jurisdiction was unreasonable on the facts of this particular case. *Id.* 38. The Court should reject the first argument and decline to reach the second, instead remanding the case to allow the Ninth Circuit to consider the effect of this Court's intervening decisions in *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1659 (2013), and *Mohamed v. Palestinian Authority*, 132 S. Ct. 1702 (2012), on its reasonable determination.

A. There Is No Basis For Petitioner's Proposed Per Se Rule.

This Court has never applied a per se rule to any part of the Due Process analysis, much less to the reasonableness prong. To the contrary, this Court has "reject[ed] any talismanic jurisdictional formulas," instead instructing that "'the facts of each case must always be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King*, 471 U.S. at 485-86 (quoting *Kulko*, 436 U.S. at 92); *id.* at 486 n.29 ("This approach does, of course, preclude clear-cut jurisdictional rules."); *see also, e.g.*, *Int'l Shoe*, 326 U.S. at 319 (the Due Process test "cannot be simply mechanical or quantitative").

Indeed, the principal authority petitioner cites in support of its per se rule, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), unambiguously declined to adopt a per se rule. *See id.* at 113 ("We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors."); *id.* at 116 (reaching reasonableness

conclusion based on the combination of many facts); *see also, e.g.*, *Perkins*, 342 U.S. at 445 ("The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case.").

The rule petitioner proposes is a particularly poor candidate for the Court's inaugural per se rule. For one thing, it is debatable whether it would even apply to this case: although petitioner claims to be a "foreign company," at the times relevant here it was, as a practical matter, a joint American-German company, formed through a merger with Chrysler and maintaining dual operational headquarters in Michigan and Germany. *See* Pet. App. 5a-6a & n.6.[20]

In addition, there is no rational basis for the gerrymandered contours of the rule petitioner proposes. Petitioner says that the rule is necessary to avoid international friction because "[c]onduct

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[20] Petitioner disputes that it had dual headquarters here and in Germany, but neither court below was required to resolve the issue. Pet. App. 6a n.6, 35a. Notably, if respondents are correct, then personal jurisdiction is proper in Michigan even under a rule limiting general jurisdiction to the state in which the company is incorporated or has a principal place of business. Accordingly, if this Court holds that jurisdiction is unavailable in California, the Court should remand to allow the court of appeals to decide whether a remand is appropriate to allow respondents to make any needed amendments to their complaint, or otherwise conduct proceedings to determine whether a transfer the Eastern District of Michigan is appropriate. *See, e.g.*, *id.* 17a n.9; BIO 17-18; *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009).

occurring in a foreign nation is already governed by that country's laws." Petr. Br. 38. But that objection applies whether jurisdiction is based on the contacts of a company's subsidiary or subdivision. Were the Court to adopt petitioner's per se rule, it would simply be a matter of time before defendants like petitioner were back in the Court arguing that the limitation petitioner proposes should be abandoned as unprincipled, seeking instead an across-the-board prohibition against litigation in U.S. courts against foreign defendants for foreign conduct.

Which returns us again to the premise of much of petitioner's and its *amici*'s briefing – a general dissatisfaction with general jurisdiction over foreign companies in the United States. While there may be sound policy reasons for Congress to prohibit such litigation, for this Court to hold that such litigation is per se unconstitutional would be a very substantial change in the law. For example, it would draw into question the constitutionality of a number of extraterritorial federal statutes that reach foreign defendants engaged in foreign conduct. *See, e.g.*, 15 U.S.C. § 22 (antitrust); 22 U.S.C. §§ 2780(b)(1), (l)(3)(D) (ban on international weapons trade with certain countries supporting terrorism); 18 U.S.C. § 174 (biological weapons offenses against U.S. citizens abroad); *see also Kiobel*, 133 S. Ct. at 1669 (leaving open possibility of extraterritorial application of ATS in some cases); *id.* (Kennedy, J., concurring) (same).

B. The Court Nonetheless Should Remand The Case To Allow The Court Of Appeals To Reconsider Its Reasonableness Holding In Light Of *Kiobel* and *Mohamed*.

In its final alternative argument, petitioner asks this Court to review the court of appeals' fact-bound reasonableness determination. But there is no need to do so and every reason not to. Instead, the Court should vacate and remand to allow the court of appeals to reassess its reasonableness determination in light of this Court's intervening decisions in *Mohamed* and *Kiobel*.

1. The petition presented a general question: whether exercising jurisdiction is constitutional "based *solely* on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state." Pet. i (emphasis added). This Court can fully answer that question by accepting or rejecting petitioner's alter ego and per se reasonableness rules. Petitioner's additional fact-bound challenge to the court of appeals' overall reasonableness analysis – which asks this Court to take into account not only "the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state," *id.*, but also a variety of other case-specific considerations, such the alleged availability of other forums, *see* Petr. Br. 41-43 – falls outside the scope of the Question Presented and, in any event, is not worth this Court's time. The task would consume considerable time and resources. For example, petitioner asks this Court to evaluate whether either Argentina or Germany would provide an alternative forum for this litigation, which would

require the Court to evaluate the competing testimony of the parties' experts, as well as underlying source materials regarding Argentine and German law applicable to the unusual facts of this case. *See id.* And whatever the Court concludes likely would affect no other case but this.

2. A remand is advisable in any event. One of the factors the Ninth Circuit considered in its reasonableness analysis was California's interest in providing a forum for the litigation of federal law claims under the TVPA and ATS. Pet. App. 35a-37a. Petitioner now argues that the Court's intervening decisions in *Mohammed* and *Kiobel* have extinguished those claims. Petr. Br. 41. Where an intervening decision arguably undermines the basis of a lower court's decision, a remand is appropriate. *See, e.g.*, *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996).

In addition, if, as petitioner argues (Br. 3 n.1), the only remaining basis of federal jurisdiction in this case is supplemental jurisdiction, the district court would have discretion to decline to exercise that jurisdiction over the remaining non-federal claims. *See* BIO 15-16. In that circumstance, it would be appropriate to remand the case to the district court to allow it to exercise that discretion in the first instance, potentially obviating the need for a constitutional ruling.

C. Petitioner's Objections To The Court Of Appeals' Reasonableness Determination Are Meritless.

In any event, petitioner's reasonableness objections are meritless.

When a plaintiff has established sufficient minimum contacts between the defendant and the forum, the defendant may yet avoid jurisdiction, but it "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. The fact that litigation in the forum would be burdensome, that some other forum might be available or more convenient, or the "potential clash of the forum's law with" the interests of another sovereign is not enough. *Id.* "Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional," such as through "choice-of-law rules" or allowing the defendant to "seek a change of venue." *Id.*

Viewed in light of this standard, and the relevant reasonableness factors, petitioner has not met its burden here.

Interests of the Forum State. As the court of appeals recognized, states, as members of our federal system, have an important interest in enforcing applicable federal laws over those falling within the state's jurisdiction. Pet. App. 35a-37a. Accordingly, respondents agree that the continued viability of their ATS claims after *Kiobel* is an important consideration, Petr. Br. 41, one the court of appeals obviously did not consider in its pre-*Kiobel* opinion.

But even if petitioner is right that there are no longer any viable federal claims in the case, that would not be determinative. While states' interest in providing a forum is enhanced when the case involves local law or parties, *see Asahi*, 480 U.S. at 114-15, a state nonetheless retains an important interest in

adjudicating claims against those who conduct sufficient business in a state to warrant general jurisdiction in the forum. Indeed, adjudicating claims that arose elsewhere, and therefore may require application of foreign law, is the principle function of general jurisdiction.

Thus, this Court has never questioned that it is reasonable to exercise jurisdiction over a defendant who otherwise has satisfied the requirements for general jurisdiction, whether the defendant is a corporation "at home" in the forum, or an individual simply passing through, *Burnham*, 495 U.S. at 612-15 (Scalia, J.); *id.* 628-29 (Brenan, J.). At the very least, there should be a strong presumption of constitutional reasonableness when the defendant has sufficient minimum contacts with a state to warrant general jurisdiction.[21]

Accordingly, this case is clearly distinguishable from *Asahi*, in which there was no claim to general jurisdiction over the defendant. *See Nicastro*, 131 S. Ct. at 2803 (Ginsburg, J., dissenting) (noting that the defendant in *Asahi* "engaged no distributor to promote its wares" in the United States). To the contrary, the Japanese defendant's only connection to

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[21] We note again that as the case comes to the Court, petitioner has conceded that if MBUSA's contacts are appropriately taken into account, they are sufficient to establish general jurisdiction over petitioner. *See supra* 14-15. Accordingly, the Court must proceed on the assumption that minimum contacts sufficient to support general jurisdiction have been established unless the Court decides that the subsidiary's contacts are irrelevant (in which case there is no reason to consider petitioner's reasonableness arguments).

California was that it sold its valve stem assemblies to an unrelated company in Taiwan, which used the parts in assembling tires that eventually made their way to California through the stream of commerce. *Asahi*, 480 U.S. at 106-07. Here, petitioner participates substantially and directly in the California economy through its extensive control over its wholly owned subsidiary. *See* Pet. App. 31a-32a. Its activities there, and the benefits it receives from them, dwarf those of many California-based corporations (including some of petitioner's direct competitors) who are unquestionably subject to the state courts' general jurisdiction. California has a substantial and legitimate interest in ensuring that companies equally at home in the state in an economic sense are treated on equal footing in its courts.

The state's interests in providing a forum are also enhanced when, as here, the plaintiff seeks to vindicate fundamental human rights recognized by all civilized nations, whether enforced through statutes like the ATS or more general causes of action under applicable local law. *Compare Asahi*, 480 U.S. at 114-15 (California has little interest in adjudicating indemnification claim between tire manufacturer and valve stem supplied). There should be no constitutional barrier, for example, to a state exercising jurisdiction over former military officials accused of human rights abuses when those officials are found within the United States, regardless of the source of law providing the plaintiffs' relief. *Cf. Samantar v. Yousef*, 560 U.S. 305 (2010) (considering such a claim).

Burden on the Defendant. Ordinarily, concerns of litigation convenience are resolved through motions for transfer of venue or *forum non-conveniens*, *see Burger King*, 471 U.S. at 477, which petitioner has not yet sought. Regardless, if any foreign corporation can be expected to litigate in California, it is petitioner, a large sophisticated multi-national corporation that has previously availed itself of California courts to enforce its rights and further its interests. *See* Pet. App. 31a.

Moreover, given that petitioner insists that Argentina is an available alternative forum, the question should be whether litigation in California is more burdensome than litigation in Argentina, which is even farther away. There is no reason to believe that it is. *See id.* 39a n.18 (noting the State Department's expressions of concern about the Argentine legal system).

Nor are the alleged language difficulties so significant as to render the exercise of jurisdiction unconstitutional. *Contra* Petr. Br. 39-40. The official language of petitioner's company is English, Pet. App. 33a, and the Spanish documents and testimony would need to be translated wherever this case was litigated.

Sovereignty of Foreign Nations. Nor is it any invasion of German sovereignty to require petitioner – which earns nearly half its income from U.S. sales and was formed through a merger with an American company, *id.* 34a – to bear the same burdens as other American companies conducting far less business in this country, which must nonetheless submit to general jurisdiction here.

In any event, petitioner's principal claim is that Germany's sovereignty would be offended by extraterritorial application of California law. Petr. Br. 40-41. But that is precisely the kind of question this Court directed be resolved through choice of law principles, not the Due Process Clause. *Burger King*, 471 U.S. at 477.[22]

Availability of Alternative Forums. Petitioner faults the court of appeals for allegedly requiring petitioner "to prove that courts in Germany or Argentina were more appropriate forums than California" when, it says, *Asahi* "made clear that it is a *plaintiff's* burden to show that a more convenient forum is *not* available." Petr. Br. 42. Petitioner overreads *Asahi*, which did not directly address the distribution of burdens, 480 U.S. at 114, much less openly overrule the Court's prior holding that the defendant bears the burden of establishing unreasonableness. *See Burger King*, 471 U.S. at 477. But in any case, the court of appeals expressly put the burden on respondents. *See* Pet. App. 38a. It simply concluded that petitioners met their burden with respect to Argentina, *id.* 38a-39a, and that it did not need to resolve the various disputes between the experts with respect to Germany because, even

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[22] Although this Court in *Asahi* took into account the sovereignty interests of other nations as part of the Due Process reasonableness analysis, 480 U.S. at 115, it did not explain why foreign sovereigns' interests should play a role in implementing a U.S. constitutional provision focused on the due process rights of litigants and the "limits imposed on [American states] by their status of coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292.

assuming it was an available forum, the overall balance of considerations permitted jurisdiction, *id.* 41a.

Nor do petitioner's other complaints have merit. Petitioner does not dispute the Ninth Circuit's legal conclusion that a forum is not available if the plaintiffs' claims would be barred by a statute of limitations. *See* Pet. App. 39a; Petr. Br. 43-44; *see also Keeton*, 465 U.S. at 778. And it says nothing to explain why the court of appeals was wrong in finding that "[a] recent Supreme Court case in Argentina has held that human rights civil cases arising out of the Dirty War" made clear that respondents' claims would be time barred under the applicable "two-year and three-month statute of limitations." Pet. App. 38a-39a. Instead, petitioner simply quotes the district court's general conclusion that Argentina is an available forum, Petr. Br. 43, without acknowledging that neither the district court nor petitioner's expert addressed the statute of limitations issue, which arose from an Argentine Supreme Court decision that post-dated the district court proceedings. *See* Pet. App. 38a-39a, 124a-25a; J.A. 76-89.

With respect to Germany, petitioner complains about the quality of respondents' expert report, but does not engage the (quite complicated) legal issues underlying the experts' disagreement. Pet. App. 42-43a. The fact that the district court "accepted" petitioner's expert's representation that "'German law would allow a human rights action against a corporation,'" Petr. Br. 42a (quoting Pet. App. 91a), is hardly conclusive. For one thing, that assertion fails to address the various other barriers respondents and

the Ninth Circuit identified, including petitioner's amenability to service in such a suit. Pet. App. 40a. And while the district court credited petitioner's expert's overall conclusion that Germany was an available forum, it was not because the court actually evaluated the substance of the experts claims; instead, the court simply thought that petitioner's expert report was "much more thorough." *Id.* 91a. But in the absence of an evidentiary hearing at which credibility questions could be resolved, that was not a proper basis to resolve the experts' differences. *See id.* 19a.

Finally, even assuming that Germany was an available forum, that fact alone is not determinative. When a company makes itself at home in many places, taking advantage of the markets throughout our country or the world, it is reasonably subject to jurisdiction in those places even if it would also be amenable to suit in its place of incorporation or principle place of business. Thus, for example, this Court has upheld the constitutionality of tag jurisdiction over individuals physically present in a state, even though they are (virtually by definition) also subject to suit in their home state. *Burnham*, 495 U.S. at 619 (Scalia, J.); *id.* 628-29 (Brenan, J.). Corporations have no claim to better treatment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and remanded.[23]

Respectfully submitted,

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[23] Even if the Court were to hold that California courts have no personal jurisdiction over petitioner, it should nonetheless remand to allow the court of appeals to decide whether respondents should be permitted to pursue their argument that jurisdiction is permitted under Fed. R. Civ. P. 4(k)(2), *see* Pet. App. 17a n.9, or seek a transfer to the Eastern District of Michigan, *see supra* 49 & n.20.

AMICUS CURIAE BRIEF

RECORD
AND
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In the Supreme Court of the United States

DAIMLERCHRYSLER AG, PETITIONER

v.

BARBARA BAUMAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether and under what circumstances the Due Process Clause of the Fourteenth Amendment permits a court to exercise personal jurisdiction over a parent corporation based on its subsidiary's contacts with the forum State, in a case not arising out of, or related to, either corporation's contacts with the State.

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In the Supreme Court of the United States

No. 11-965

DAIMLERCHRYSLER AG, PETITIONER

v.

BARBARA BAUMAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns a federal court's exercise of personal jurisdiction over a foreign parent corporation based on its subsidiary's contacts with the State in which the federal court sits, in a case not arising out of, or related to, either entity's contacts with the State. This Court has referred to such a claim of adjudicatory authority as "general" personal jurisdiction. *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2851 (2011). In some instances, the interests of the United States are served by permitting suits against foreign entities to go forward in domestic courts. But expansive assertions of general jurisdiction over foreign corporations may operate to the detriment of the United States' diplomatic relations and its foreign trade and economic interests. See U.S. Br. at 1-2, 28-34, *Good-*

year, *supra* (No. 10-76) (U.S. *Goodyear* Br.). Those concerns would only be magnified under the court of appeals' framework, which fails even to give foreign defendants fair warning of what conduct would subject them to suit in domestic courts, and thus leaves them unable "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

From an economic perspective, the inability to predict the jurisdictional consequences of commercial or investment activity may be a disincentive to that activity. Likewise, an enterprise may be reluctant to invest or do business in a forum, if the price of admission is consenting to answer in that forum for all of its conduct worldwide. The uncertain threat of litigation in United States courts, especially for conduct with no significant connection to the United States, could therefore discourage foreign commercial enterprises from establishing channels for the distribution of their goods and services in the United States, or otherwise making investments in the United States. Such activities are likely to be undertaken through domestic subsidiaries and thus are likely to implicate the decision below.

From a diplomatic perspective, foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments. See Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 161-162. The conclusion of such international compacts is an important foreign policy objective because such agreements serve the United States' interest in providing its residents a

fair, sufficiently predictable, and stable system for the resolution of disputes that cross national boundaries.

The United States has a further interest in preserving the federal government's legislative and regulatory flexibility to foster those trade, investment, and diplomatic interests, while assuring a domestic forum to adjudicate appropriate cases. This case does not directly implicate that interest. It does not, for example, involve an Act of Congress addressing the relationship between a parent corporation and its subsidiary, or reflecting Congress's judgment concerning relevant contacts with a forum for jurisdictional purposes. And it presents a question under the Due Process Clause of the Fourteenth Amendment, while exercises of the federal judicial power are, as a constitutional matter, constrained instead by the Due Process Clause of the Fifth Amendment.[1] Nonetheless, because the political Branches are well positioned to determine when the exercise of personal jurisdiction will, on balance, further the United States' interests, the United States has an interest in ensuring proper regard for their judgments in this field.

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[1] "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion). For example, the United States' special competence in matters of interstate commerce and foreign affairs, in contrast to the limited and mutually exclusive sovereignty of the several States (see *ibid.*), would permit the exercise of federal judicial power in ways that have no analogue at the state level. This Court has consistently reserved the question whether its Fourteenth Amendment personal jurisdiction precedents would apply in a case governed by the Fifth Amendment, and it should do so here. See, *e.g.*, *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987).

STATEMENT

1. a. Principles of due process establish the outer limits of a federal court's authority to assert personal jurisdiction over a defendant and thus to "make binding a judgment in personam against an individual or corporate defendant." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-319 (1945). When a federal court exercises federal question jurisdiction, the Due Process Clause of the Fifth Amendment marks the outermost limit of that authority. See *Omni Capital*, 484 U.S. at 102-105.

Acting within those limits, Congress has provided by Rule that in many federal cases, a federal district court is limited to the personal jurisdiction available to the courts of the State within which the federal court sits. In particular, "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant * * * who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Thus, the question in such federal cases is whether the courts of the forum State would have personal jurisdiction over the foreign defendant consistent with the State's "long arm" statute and the constraints of the Due Process Clause of the Fourteenth Amendment.

The court of appeals apparently decided this case under Rule 4(k)(1)(A) (cf. Pet. App. 17a n.9), and respondents have not asked this Court to affirm the judgment below on some other basis. California's long arm statute permits the exercise of personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code § 410.10 (West 2004). Accordingly, the question in this Court is whether a California court could exercise personal ju-

risdiction over petitioner consistent with the Due Process Clause of the Fourteenth Amendment.

b. "The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear*, 131 S. Ct. at 2853. A State may authorize its courts to exercise personal jurisdiction over an out-of-state juridical person that has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citation omitted). This limitation on a court's authority "protects [a defendant's] liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 471-472 (1985) (quoting *International Shoe*, 326 U.S. at 319). In turn, that constraint provides "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

This Court has "differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction." *Goodyear*, 131 S. Ct. at 2851 (citing *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 nn.8-9 (1984)). "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State." *Ibid.* (internal quotation marks omitted). Specific jurisdiction, by contrast, is the

exercise of "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros*, 466 U.S. at 414 n.8.[2]

The nature and quantity of minimum contacts with a State needed for the exercise of personal jurisdiction to comport with "traditional notions of fair play and substantial justice" depends on whether the court claims a limited authority to adjudicate a particular suit (specific jurisdiction), or instead an authority to adjudicate all matters involving the defendant, wherever they occur (general jurisdiction). In particular, a court may assert specific jurisdiction over a defendant "if the defendant has 'purposefully directed' [its] activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472-473 (quoting *Keeton* v. *Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984); *Helicopteros*, 466 U.S. at 414)).

General jurisdiction, by contrast, concerns a court's authority over matters "arising from dealings entirely distinct from" the defendant's contacts with the forum. *Goodyear*, 131 S. Ct. at 2853 (citation omitted). A plaintiff need not demonstrate any connection between the forum and the events that gave rise to the suit, but must instead make a more demanding showing: Whereas "single or occasional acts in a State may be sufficient to render a corporation answerable in that State with respect to those acts" on a theory of specific jurisdiction, general jurisdiction requires "the kind of continuous and

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[2] This Court has also recognized other bases for a State's assertion of personal jurisdiction not implicated in this case, such as express consent and personal service on a natural person while he is within the State's territorial jurisdiction. See *J. McIntyre*, 131 S. Ct. at 2787 (plurality opinion).

systematic general business contacts" that "render [the defendant] essentially at home in the forum State." *Id.* at 2851, 2853, 2856 (internal quotation marks and citations omitted). "[T]he paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home," such as its "domicile, place of incorporation, [or] principal place of business." *Id.* at 2853-2854 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 728 (1988) (*General Jurisdiction*)); cf. *J. McIntyre*, 131 S. Ct. at 2787 (plurality opinion) (citing *Goodyear*); *id.* at 2797 (Ginsburg, J., dissenting) (citing *Goodyear*).

2. Petitioner DaimlerChrysler AG was formed in 1998 when Daimler-Benz AG merged with the United States-based Chrysler Corporation. Petitioner is a German *Aktiengesellschaft* (a juridical form closely resembling a publicly traded stock corporation) with its principal place of business in Stuttgart, Germany. As part of its broader business, petitioner manufactures Mercedes-Benz vehicles at plants in Germany. Mercedes-Benz United States, LLC (MBUSA), is a Delaware limited liability company with its principal place of business in New Jersey. MBUSA purchases Mercedes-Benz vehicles from petitioner in Germany, imports them into the United States, and distributes them throughout the Nation. MBUSA is a wholly owned subsidiary of DaimlerChrysler North America Holding Corporation (DCNAHC), which is a Delaware corporation with its principal place of business in Michigan. DCNAHC is in turn a wholly owned subsidiary of petitioner. MBUSA's relationship with petitioner is governed by a General

Distributor Agreement between the companies. J.A. 60a-62a, 149a-215a.[3]

Respondents are twenty-two Argentinian residents who allege that another of petitioner's subsidiaries, Mercedes-Benz Argentina, collaborated with state security forces to kidnap, detain, torture, and kill respondents or their relatives in Argentina during Argentina's "Dirty War" in 1975-1977. Pet. App. 2a-3a; J.A. 27a-49a. Respondents sued petitioner in the Northern District of California, asserting claims under the Alien Tort Statute (ATS), 28 U.S.C. 1350, the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. 1350 note, various international treaties and declarations, federal common law, and (unidentified) provisions of California law. J.A. 49a-57a.[4]

3. The district court granted petitioner's motion to dismiss for lack of personal jurisdiction. Pet. App. 80a-93a; see *id.* at 94a-133a (tentatively granting motion to dismiss but permitting limited jurisdictional discovery).

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[3] Petitioner restructured in 2007, selling its majority interest in Chrysler Car Group. The court of appeals found this development irrelevant both because personal jurisdiction is determined as of the time the suit was filed and because the restructuring did not materially change the corporate relationship between petitioner and MBUSA. Pet. App. 7a n.7. For simplicity, this brief refers in the present tense to petitioner's corporate family as it existed at the time this suit was filed.

[4] Because respondents are foreign residents and petitioner is a foreign entity, the district court correctly concluded that the case was not within its diversity or alienage jurisdiction. Pet. App. 81a n.3. The court instead noted federal question jurisdiction under the ATS and 28 U.S.C. 1331, though respondents' ATS and TVPA claims do not survive this Court's intervening decisions in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and *Mohamad* v. *Palestinian Authority*, 132 S. Ct. 1702 (2012).

The court noted that "[t]he parties agree that [respondents'] claim does not arise out of or relate to [petitioner's] purported activity in California," and thus respondents "do not seek to establish specific jurisdiction," but instead "contend that the court has general jurisdiction over [petitioner]." *Id.* at 98a-99a.

The district court explained that under circuit precedent, a California court could exercise general jurisdiction over petitioner if it had "continuous and systematic contacts with California through MBUSA's contacts." Pet. App. 113a. It noted that petitioner "does not dispute that MBUSA is subject to general jurisdiction in California but argues that MBUSA's contacts cannot be imputed to [petitioner]." *Ibid.* The court stated that "[a] subsidiary's contacts may be imputed to the parent * * * where the subsidiary acts as the general agent of the parent," which under circuit precedent turned on whether the subsidiary was "performing services sufficiently important to the parent corporation that if it did not have a representative to perform them, the parent corporation would undertake to perform similar services." *Id.* at 113a-115a (internal quotation marks, alterations, and citations omitted).

The district court concluded that respondents failed to establish that, but for the existence of MBUSA, petitioner would undertake MBUSA's tasks itself. See Pet. App. 83a-85a, 115a-117a. The court placed particular emphasis on the facts that petitioner had previously used non-subsidiary entities to distribute its vehicles in the United States, and that another foreign automobile manufacturer (Toyota) currently uses such distribution channels. *Id.* at 84a-85a. Because the court refused to attribute MBUSA's contacts to petitioner, and petitioner lacked direct contacts with California, the court con-

cluded it could not exercise personal jurisdiction over petitioner.

4. The court of appeals initially affirmed, largely on the district court's reasoning. Pet. App. 46a-61a. On rehearing, however, it reversed. *Id.* at 1a-45a. As relevant here, it held that the contacts of a subsidiary may be attributed to its parent for jurisdictional purposes when (1) "the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services," and (2) there exists "an element of control" of the subsidiary by the parent. *Id.* at 21a-22a (citation and emphasis omitted). The court stated that it "need not define the precise degree of control required to meet that test or establish any particular method for determining its existence." *Id.* at 23a n.12.

Applying that test, the Ninth Circuit concluded that "[t]he services that MBUSA currently performs are sufficiently important to [petitioner] that they would almost certainly be performed by other means if MBUSA did not exist, whether by [petitioner] performing those services itself or by [petitioner] entering into an agreement with a new subsidiary or a non-subsidiary national distributor for the performance of those services." Pet. App. 25a. The court noted that the market served by MBUSA accounts for 19% (and the California market, 2.4%) of worldwide sales of Mercedes-Benz vehicles. *Ibid.* The court also found the control prong of its test satisfied, focusing on the General Distributor Agreement, which the court described as giving petitioner the rights to "control nearly every aspect" of

MBUSA's operations and to require MBUSA to execute supplemental agreements that "are not an 'unreasonable burden' on MBUSA." *Id.* at 29a-32a. On that basis, the court of appeals held that petitioner was subject to the district court's general jurisdiction.

5. The court of appeals denied rehearing en banc over the dissent of eight judges. Pet. App. 134a-145a. Writing for the dissenting judges, Judge O'Scannlain criticized the panel's approach as "far too expansive and threaten[ing] to make innumerable foreign corporations unconstitutionally subject to general personal jurisdiction in our courts." *Id.* at 140a. He observed that "[a]nything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." *Ibid.* The dissent urged that such a limitless test fails to respect deeply ingrained notions of corporate separateness and is at odds with this Court's decisions. See *id.* at 140a-141a, 142a n.4.

SUMMARY OF ARGUMENT

The court of appeals held that a large German corporation with few if any direct contacts with California could nonetheless be held to answer in that State for any claim against it, arising anytime, anywhere in the world. The court justified that result by applying a malleable "agency" test to attribute to petitioner the California sales and marketing contacts of petitioner's indirect subsidiary MBUSA. The Ninth Circuit's attribution analysis is seriously flawed, and its result is difficult to square with *Goodyear*.

Goodyear confined general jurisdiction to cases in which the corporate defendant's "affiliations with the State are so 'continuous and systematic' as to render [it]

essentially at home in the forum State," 131 S. Ct. at 2851. The Ninth Circuit's approach effectively endorses general jurisdiction whenever an out-of-state corporation does any substantial business in the State, and then extends that test through a nontraditional concept of "agency" to attribute a subsidiary's business to its foreign parent. Substantial reason exists to doubt that merely doing business in a forum makes a corporation "at home" there. Here, for example, MBUSA's contacts with California—the distribution, marketing, and sale in California of 2.4% of petitioner's production—are modest relative to petitioner's contacts with Germany, a forum in which petitioner is paradigmatically "at home." Although general jurisdiction is not measured by mechanical quantitative tests, that fact alone should give this Court pause at the result below.

The certiorari petition focuses more specifically on whether MBUSA's California contacts should be attributed to petitioner at all. On that issue, the Court should reject the Ninth Circuit's approach. The Due Process Clause does not, as the Ninth Circuit seemed to assume, supply fixed rules that permit or forbid the attribution of contacts from one entity to another. Rather, such rules are the province of positive law that molds the legal expectations of juridical persons and those with whom they interact. Of central relevance here, the principle of separate corporate personality pervades our legal system, but so too do traditional understandings on which substantive alter ego liability is imposed on a parent corporation, and on which a principal is held vicariously liable for its agent's actions. Those understandings, in turn, are appropriate bases on which to attribute contacts of a subsidiary to its parent for jurisdictional purposes. By contrast, the Ninth Cir-

cuit's approach is divorced from the background principles of law that fairly set corporations' expectations about their responsibilities for their corporate affiliates, and it is inconsistent with the Due Process Clause's demand that jurisdictional rules be fair and sufficiently predictable in operation.

ARGUMENT

The court of appeals applied a rule for attributing a subsidiary's forum contacts to its foreign parent that is inconsistent with due process, and indeed is not grounded in any applicable law shaping petitioner's expectations about the jurisdictional consequences of its corporate affiliations. Even apart from its flawed approach to attribution of contacts, the court below embraced the startling conclusion that the relatively small fraction of a German manufacturer's production sold in California by a corporate affiliate permits that State's courts to bind the German corporation to judgment on potentially any claim, arising anytime, anywhere in the world. *Goodyear* puts that result in doubt by holding that a forum court may properly exercise general jurisdiction only over corporations that are "essentially at home in the forum." 131 S. Ct. at 2851.

A. The Ninth Circuit's Decision Did Not Take Account Of *Goodyear*

The court of appeals' approach would hold a foreign parent corporation subject to general jurisdiction in a forum whenever the parent has an element of control over its subsidiary that makes substantial sales in the forum State of products manufactured and sold abroad by the foreign parent. The lower court endorsed that approach without the benefit of this Court's decision in *Goodyear*, which was announced a month after the pan-

el's decision. The result below is difficult to square with *Goodyear*'s reaffirmation of the principle that a State may bind a corporation to judgment on any claim arising anywhere in the world only when the corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State," 131 S. Ct. at 2851.

1. Because the foreign corporate defendants in *Goodyear* had only "attenuated connections to the [forum] State" that "f[e]ll far short" of the standard for exercising general jurisdiction, 131 S. Ct. at 2857, this Court did not have occasion there to explain what kinds of contacts would establish that a defendant is "essentially at home" in a particular forum. Scholars continue to debate the adequate theoretical justifications for general jurisdiction since *International Shoe*, *supra*, in an effort to shed light on the appropriate analysis of forum contacts. See, *e.g.*, Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. Rev. 527, 533-548 (2012) (*Essentially at Home*); *General Jurisdiction*, 66 Tex. L. Rev. at 727-772. Whatever precise rule emerges from *Goodyear*, we understand the Court's test to be appropriately demanding, given that an exercise of general jurisdiction subjects a defendant to suit for any claim arising anytime, anywhere in the world.

The Ninth Circuit's approach is very different. As the court of appeals acknowledged, its "agency" test "has its origins in case law from the Second Circuit," Pet. App. 32a. In particular, *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406, 423 (9th Cir. 1977), adopted the test in *Gelfand* v. *Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967), cert. denied, 390 U.S. 966 (1968). *Gelfand* in turn drew its standard from

New York cases, most prominently *Frummer* v. *Hilton Hotels International, Inc.*, 227 N.E.2d 851, 852-854 (N.Y.), cert. denied, 389 U.S. 923 (1967). *Frummer* applied a principle of "[t]raditional" New York personal jurisdiction law, *viz.*, that New York courts have general jurisdiction over a foreign corporation "engaged in such a continuous and systematic course of 'doing business' [in New York] as to warrant a finding of its 'presence' in this jurisdiction." *Id.* at 853 (citation omitted). That principle traces back decades before *International Shoe*, to cases such as *Tauza* v. *Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917) (Cardozo, J.), which held that a Pennsylvania coal company's maintenance of a "branch office in New York" for salesmen, "contain[ing] eleven desks, and other suitable equipment," subjected it to general jurisdiction in New York. *Id.* at 916-917. At bottom, therefore, the Ninth Circuit's test articulates what it meant a century ago for an out-of-state corporation to be "doing business" in New York, and then extends that test through a nontraditional concept of "agency" to attribute a subsidiary's "doing business" to its foreign parent.

Substantial reason exists to doubt the continuing vitality of the Ninth Circuit's concept of general jurisdiction. The analysis below is unmoored from this Court's "continuous and systematic" test for general jurisdiction, obligingly quoting it once (Pet. App. 20a) but never mentioning it again. More broadly speaking, a foreign corporation that merely does business in the forum State would not necessarily be "essentially at home" there. The "doing business" approach to general jurisdiction has been a source of contention in diplomatic contexts, see U.S. *Goodyear* Br. at 33 n.14, and has been subject to extensive scholarly criticism, see, *e.g.*, *Essen-*

tially at Home, 63 S.C. L. Rev. at 545-548; *General Jurisdiction*, 66 Tex. L. Rev. at 758-759, 781.

2. The particular result below, moreover, is in tension with this Court's decisions. A court may not assert general jurisdiction over a foreign parent based simply on (1) a conclusion (or concession) that its subsidiary is subject to the court's general jurisdiction, and (2) a determination to attribute some or all of the subsidiary's contacts to its parent. See *Keeton*, 465 U.S. at 781 n.13 ("Each defendant's contacts with the forum State must be assessed individually.").[5] Rather, the court must directly apply *Goodyear*'s test to the foreign parent's direct contacts (if any) and any contacts fairly attributed to it. Moreover, this Court's decisions suggest that if contacts are attributed from a subsidiary to its parent, their significance may well shrink by their placement in context with the foreign parent's independent contacts with other jurisdictions throughout the world. Cf. *Goodyear*, 131 S. Ct. at 2853-2854 (identifying as "paradigm" certain forums with which a defendant is likely to have relatively substantial contacts, implying that relatively insubstantial contacts are less likely to support the exercise of general jurisdiction); *Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437, 447-448 (1952) (finding modest corporate contacts with Ohio sufficient to establish general jurisdiction, given that the company had ceased its Philippine mining oper-

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[5] Although petitioner conceded below that MBUSA is subject to general jurisdiction in California (Pet. App. 113a; but see Pet. Br. 23 n.4), that assumption is debatable after *Goodyear*. For example, the Ninth Circuit did not conclude that California is MBUSA's "domicile, place of incorporation, [or] principal place of business"—the "paradigm" places MBUSA would be "at home." *Goodyear*, 131 S. Ct. at 2852-2854.

ations, but implying that if such operations were ongoing, the result might have been different).

Here, MBUSA's contacts with California, even if properly attributed to petitioner, would be modest relative to petitioner's contacts with the forum in which petitioner is most obviously "at home" and subject to general jurisdiction—Germany. Cf. European Community Council Reg. 1215/2012 Art. 4.1 ("[P]ersons domiciled in a [European Union] Member State shall, whatever their nationality, be sued in the courts of that Member State."); Zivilprozessordnung [ZPO] [Code of Civil Procedure] Dec. 5, 2005, Bundesgesetzblatt [BGBI] 3202, as amended, § 17, ¶ 1, sentences 1-2 ("The general venue of * * * corporate bodies * * * is defined by their registered seat. Unless anything to the contrary is stipulated elsewhere, a legal person's registered seat shall be deemed to be the place at which it has its administrative centre."). Petitioner's headquarters are in Germany, where it manufactures and sells Mercedes-Benz vehicles, and where it presumably orchestrates its corporate operations. J.A. 60a-62a. By contrast, only 2.4% of petitioner's production is ultimately sold in California by MBUSA, Pet. App. 7a, and none is sold by petitioner, whose direct contacts with California appear minimal or nonexistent, see *id.* at 95a.

This Court has eschewed "simply mechanical or quantitative" jurisdictional tests. *International Shoe*, 326 U.S at 319. But *Goodyear*'s "at home" inquiry weighs against recognizing general jurisdiction where, as here, the defendant's forum contacts are dwarfed (in both qualitative and quantitative senses) by its contacts with a forum in which it is paradigmatically "at home." See Pet. Br. 31 n.5; *J. McIntyre*, 131 S. Ct. at 2797 (Ginsburg, J., dissenting) (recognizing that an English

corporate defendant whose product was distributed through a third party and caused an injury in New Jersey "surely [wa]s not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation [was] hardly 'at home' in New Jersey") (quoting *Goodyear*, 131 S. Ct. at 2851). Likewise, the sheer consequences of the court of appeals' expansive notions of general jurisdiction are a further reason to doubt the compatibility of the judgment below with *Goodyear*. The decision below ultimately rests on the sales and marketing contacts associated with a relatively small portion of production to assert general jurisdiction over petitioner potentially concerning claims arising anytime, anywhere in the world—the vast majority of which would (like respondents' claims here) have no relation to California. There seems little to recommend that result, in either theory or practice.

B. The Ninth Circuit's Framework For Attributing Contacts Of A Corporate Subsidiary To Its Parent Offends Due Process

For the reasons above, the Ninth Circuit's result is in considerable tension with *Goodyear*, even assuming that MBUSA's contacts with California were properly attributed to petitioner. But the record was developed and the case was decided below without the benefit of *Goodyear*, and petitioner sought this Court's review on the specific question (see Pet. i) of the Ninth Circuit's approach to attribution of a subsidiary's forum contacts to its foreign parent. Answering that question, the Court should reject the Ninth Circuit's approach to attribution.

The Due Process Clause itself does not intrinsically forbid or permit the attribution of a subsidiary's contacts to its parent. Rather, due process analysis should

look to the general framework of state law (and when appropriate, federal law) to define the circumstances in which forum contacts may be attributed to a foreign defendant, within outer constitutional limits that ensure fairness and sufficient predictability. In our legal system, the pervasive principle of separate corporate personality is grounded in positive law; it forms the backdrop for the operation of other legal norms; and it molds the expectations of the corporations themselves and those with whom they interact. Within that legal framework, the paradigmatic (if not inevitably exclusive) state law bases on which one entity is held responsible for the acts of another are the traditional understandings on which substantive alter ego liability is imposed on a parent corporation, and on which a principal is held vicariously liable for its agent's actions. The Ninth Circuit's approach, however, ignores that framework and is inconsistent with the Due Process Clause's demand that jurisdictional rules be fair and sufficiently predictable in operation.

1. The Due Process Clause does not itself prescribe rules for attribution of contacts to a juridical person

a. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (internal quotation marks and alteration omitted)). Rather, "[t]he substantive relations that enter into due process calculations are primarily a matter of the law that creates the cause of action, usually state law." Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 25 (1986). For example, it is well established that the "property" rights protected by the Due

Process Clauses "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The same is true of certain "liberty" interests. See, *e.g.*, *District Atty's Office* v. *Osborne*, 557 U.S. 52, 68 (2009).

Moreover, this Court has often declined to infuse the Due Process Clause with absolute or prescriptive content, but rather has taken into account tradition and practical considerations, with due regard for legislative judgment. See, *e.g.*, *Turner* v. *Rogers*, 131 S. Ct. 2507, 2517-2520 (2011) (recognizing that in some child-support civil contempt proceedings, either provision of counsel or a "set of substitute procedural safeguards" shown by "considerable experience" to be adequate would satisfy due process) (internal quotation marks and citation omitted); *Osborne*, 557 U.S. at 69 ("[W]hen a State chooses to offer help to those seeking relief from convictions, due process does not dictat[e] the exact form such assistance must assume.") (brackets in original, internal quotation marks and citation omitted); *Jones* v. *Flowers*, 547 U.S. 220, 234 (2006) ("[I]t is not [the Court's] responsibility to prescribe the form of service that the [government] should adopt [to provide adequate notice of the pendency of proceedings].") (citation omitted, third set of brackets in original); *Mathews*, 424 U.S. at 349 ("In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.").

b. For similar reasons, this Court should not constitutionalize fixed rules governing the attribution of contacts from one juridical person to another for jurisdictional purposes, without regard to the substantive legal regime within which those entities operate. The inappropriateness that approach is illustrated by both historical and contemporary considerations.

As a historical matter, with the possible exception of some special corporate charters, "[u]ntil the New Jersey legislature in 1888 granted permission for any corporation chartered in the state to own stock in another corporation, neither parent-subsidiary holding companies nor other intercorporate arrangements could exist anywhere in the nation." Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023, 1051 (2004) (*Vicarious Jurisdiction*) (citing *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 556 n.32 (1933) (Brandeis, J., dissenting in part)). Moreover, even in the early decades of the Twentieth Century "the doctrinal boundaries of limited liability for corporate shareholders were hardly settled, and the doctrinal exceptions to the rule were still being shaped." *Id.* at 1052. Indeed, the now-ubiquitous metaphor of "piercing the corporate veil" was not coined until 1912. I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 Colum. L. Rev. 496 (1912). Thus, when the Fourteenth Amendment was ratified in 1868, the fact pattern of a parent-subsidiary relationship was rarely if ever observed, and the limited liability that now characterizes corporate personality was not established in substantive law.

Further counseling against any one fixed rule is the modern diversity of state-authorized juridical forms, which has burgeoned from traditional partnerships,

trusts and stock corporations to include—by legislative judgment—limited partnerships, limited liability partnerships, limited liability companies (LLCs), and the like. See generally Robert W. Hamilton & Jonathan R. Macey, *Cases and Materials on Corporations Including Partnerships and Limited Liability Companies* 8-24 (10th ed. 2007) (discussing these and other forms). Courts grappling with the personal jurisdictional ramifications of such entities have found different attribution principles appropriate for different juridical forms. See, *e.g.*, *Donatelli* v. *National Hockey League*, 893 F.2d 459 (1st Cir. 1990) (unincorporated association); *Jackson Nat'l Life Ins. Co.* v. *Greycliff Partners, Ltd.*, 2 F. Supp. 2d 1164, 1167 (E.D. Wis. 1998) (partnership); *Marriott PLP Corp.* v. *Tuschman*, 904 F. Supp. 461, 465-467 (D. Md. 1995) (limited partnership); *Graymore, LLC* v. *Gray*, No. 06-cv-638, 2007 WL 1059004, at *7-*8 (D. Colo. Apr. 6, 2007) (limited liability company).[6] Whatever the correctness of any particular decision in that field, those cases illustrate that different considerations may apply to different juridical forms. That in turn suggests that any attempt to constitutionalize fixed rules about the separation or unity of a juridical entity and its owners or managers would deprive legislatures of the latitude to shape the characteristics of the juridical forms they authorize.

c. Petitioner implies that *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), already constitutionalizes separate corporate personality in the jurisdictional context by forbidding the attribution of contacts from a subsidiary to a parent. Pet. 20 (describing *Cannon* as holding "that the in-state contacts of a

[6] We accept the parties' evident assumption that MBUSA (an LLC) can be treated for present purposes as a corporate subsidiary would.

subsidiary corporation that did business in North Carolina were an insufficient basis for that State to exercise personal jurisdiction over an out-of-state parent corporation that itself had no North Carolina contacts."); see Pet. Br. 19-20.

That overreads *Cannon*, in which "[n]o question of the constitutional powers of the State, or of the federal Government, [wa]s directly presented." 267 U.S. at 336. Rather, *Cannon* concerned the distinct question whether service of process on a subsidiary corporation's employee within the forum was sufficient to establish jurisdiction over the subsidiary's foreign parent corporation, given that both North Carolina and federal law were silent on that issue. See *ibid.* ("The claim that jurisdiction exists is not rested upon the provisions of any state statute or upon any local practice dealing with the subject. * * * Congress has not provided that a corporation of one State shall be amenable to suit in the federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein."). Accordingly, "in the absence of an applicable statute," this Court respected the corporations' observance of formal separateness. *Id.* at 337; see *Vicarious Jurisdiction*, 152 U. Pa. L. Rev. at 1046-1074 (using original source material to rebut interpretations of *Cannon* as a constitutional decision).

Moreover, the relevant legal landscape has changed since *Cannon*. First, if *Cannon* is understood to proceed from general assumptions about the inherent separateness of parent and subsidiary corporations, then it may have been linked to the regime of *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). But "federal general common law" notions of corporate separateness did not survive

Erie Railroad Co. v. *Tompkins*, 304 U.S. 64, 78 (1938). Second, *Cannon* should be read in the context of *Pennoyer* v. *Neff*, 95 U.S. 714, 720 (1877), which held that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State." Not until two decades after *Cannon* did this Court's transformation of the constitutional law of personal jurisdiction culminate with *International Shoe*'s recognition that "presence" within a State is not the exclusive touchstone of the personal jurisdiction inquiry. Indeed, since *International Shoe*, the Court has cited *Cannon* only for propositions relating to a parent's amenability to service of process through its subsidiary. See *Volkswagenwerk AG* v. *Schlunk*, 486 U.S. 694, 705 n.* (1988); *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422, 439 n.21 (1949); *United States* v. *Scophony Corp. of Am.*, 333 U.S. 795, 813 n.23 (1948).[7]

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[7] Some federal courts grappling with questions of the attribution of contacts for jurisdictional purposes have adopted subconstitutional principles seemingly in the nature of federal common law. See, *e.g.*, *Hargrave* v. *Fibreboard Corp.*, 710 F.2d 1154, 1159-1160 (5th Cir. 1983). Such an approach would be inappropriate here. In *Omni Capital*, this Court refused to create a federal common law authorization for service of process to fill the interstices of federal and state statutory authorizations. The Court expressed skepticism that it had "adequate authority for common-law rulemaking." 484 U.S. at 108-109. And the Court ultimately concluded that it "would not fashion [such] a rule * * * even if [it] had the power," noting that "[l]egislative rulemaking better ensures proper consideration of a service rule's ramifications within the pre-existing structure." *Id.* at 109-111. Analogous concerns exist here, where the jurisdictional consequences of a parent-subsidiary relationship are better left to legislative definition in the first instance. Moreover, just as *Omni Capital* expressed concern that adopting a federal common law rule for service of process would run contrary to provisions of Rule 4 affirmatively addressing service, *id.* at 109, here a federal common

2. Considerations of fairness, notice, and consent support looking to state law (or when appropriate, federal law) to decide questions of attribution

Corporations are creatures of positive law and, within broad constitutional limits, the benefits and obligations of corporate existence are matters of legislative judgment. Corporate "personality is a fiction, although a fiction intended to be acted upon as though it were a fact." *International Shoe*, 326 U.S. at 316 (citation omitted). Because state law (or when appropriate, federal law) defines the legal characteristics of juridical persons in general, that law ordinarily should form the foundation for determining when one juridical person's contacts will be attributed to another. When one corporation (the parent) creates or acquires a controlling ownership interest in another corporation (its subsidiary), the parent is on notice of, and can properly be treated as subjecting itself to, the law governing the existence of the subsidiary and the parent-subsidiary relationship.

In particular, by creating or acquiring a subsidiary, the parent accedes to the rights of ownership in the subsidiary. See generally Model Business Corporation Act §§ 7.01-.48. But it also becomes liable for the subsidiary's debts if the articles of incorporation provide for shareholder liability (see, *e.g.*, *id.* § 2.02(b)(2)(v)) or if state veil-piercing law is applied to disregard the subsidiary (see generally 1 Philip I. Blumberg et al., *Blumberg on Corporate Groups* chs. 11-12 (2d ed. 2005) (*Blumberg*)). The parent-subsidiary relationship has substantial consequences under federal law too. Although this Court has interpreted federal law by default to respect

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law rule unique to cases in federal court would undermine the evident plan of Rule 4(k)(1) to avoid disparities in the jurisdictional reaches of state and federal courts (absent congressional authorization).

state corporation law, Congress may provide otherwise, see *United States* v. *Bestfoods*, 524 U.S. 51, 61-64 (1998), and it has in numerous federal laws attached substantive or regulatory consequences to intercorporate relationships.[8]

Moreover, reference to state and federal law in this context is consistent with this Court's practice of looking to and respecting legislative judgments about the corporate characteristics and intercorporate relationships that bear on the proper forum for a suit. See, *e.g.*, *Hertz Corp.* v. *Friend*, 559 U.S. 77 (2010) (interpreting Congress's rule for determining corporate citizenship for purposes of diversity jurisdiction); *Scophony*, *supra* (applying venue and service provisions of federal antitrust laws to British corporation holding a controlling interest in an American firm); *Cannon*, 267 U.S. at 337 (concluding that service there was ineffective "in the absence of an applicable statute").

3. The Due Process Clause limits the rules of attribution a State may adopt

The Due Process Clause of the Fourteenth Amendment nonetheless limits the rules a State may adopt for

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[8] See, *e.g.*, 26 U.S.C. 482 (Internal Revenue Code); 29 U.S.C. 1301(b)(1) (Employee Retirement Income Security Act of 1974); *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984) (Sherman Act); *Radio & Television Broad. Technicians Local Union 1264* v. *Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256-257 (1965) (per curiam) (National Labor Relations Act); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 606-608 (1945) (Natural Gas Act); *Anderson* v. *Abbott*, 321 U.S. 349, 357-367 (1944) (National Bank Act). See generally Philip I. Blumberg, *The Increasing Recognition of Enterprise Principles Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295 (1996) (surveying federal and state laws expressly applying to affiliated business entities).

attribution of contacts. The attribution inquiry, like any other aspect of the exercise of personal jurisdiction, must "not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citation omitted). Those limits come in two forms.

First, a State may attribute the in-state contacts of one entity to a foreign defendant for jurisdictional purposes only on terms of which the defendant has fair notice, and which are reasonably susceptible of predictable ex ante application. See *Burger King*, 471 U.S. at 472 (explaining that due process requires defendants to be given "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign") (citation omitted, brackets in original); *World-Wide Volkswagen*, 444 U.S. at 297 (insisting on rules that afford "a degree of predictability * * * that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."); cf. *Hertz*, 559 U.S. at 94 ("Simple jurisdictional rules * * * promote greater predictability. Predictability is valuable to corporations making business and investment decisions.").

Second, however clearly announced, some rules of attribution are arbitrary or fundamentally unfair, and for that reason impermissible. "A defendant [may] not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person." *Burger King*, 471 U.S. at 475 (internal quotation marks and citations omitted). Thus, for example, this Court has rejected the forum contacts of an insurer as a basis for exercising personal jurisdiction over the insured defendant. *Rush* v. *Savchuk*, 444 U.S. 320, 328-329 (1980).

A court's determination about the permissibility of attribution under the Due Process Clause should, however, be informed by legislative judgments about the basis for attribution of contacts. See *Shaffer* v. *Heitner*, 433 U.S. 186, 213-214 (1977) (emphasizing "the failure of the [state] Legislature to assert [a] state interest" in exercising jurisdiction over a state-chartered corporation's out-of-state fiduciaries in a derivative suit against the fiduciaries).

Within those broad limits, a State has latitude to provide for the exercise of personal jurisdiction over a foreign defendant on the basis of someone else's direct or physical contacts with the State. This Court has repeatedly endorsed the exercise of specific jurisdiction based on "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). Such a forum contact may be made through use of agents, salesmen, distributors, or subsidiaries in the forum (at least when that activity is deliberate on the defendant's part). See, *e.g.*, *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 112 (1987) (opinion of O'Connor, J.) (suggesting that a foreign defendant's creation, control, or use of a distribution system that predictably delivers products into the forum State may establish minimum contacts); *Burger King*, 471 U.S. at 471-476 ("[W]e have consistently rejected the notion that an absence of physical contacts can [alone] defeat personal jurisdiction.").

4. Traditional alter ego and agency principles from substantive law generally should govern the attribution of contacts from a corporate subsidiary to its parent

Legislatures have seldom spoken directly to the rules governing attribution of forum contacts for jurisdiction-

al purposes. In the absence of clear legislative direction, courts have developed a range of approaches for attributing a subsidiary's contacts to its parent. See generally 1 *Blumberg* Pt. III (comprehensively surveying these approaches). We do not think the Due Process Clause countenances the complex, malleable, and unpredictable approaches that some lower courts have devised to justify the attribution of a subsidiary's forum contacts to its foreign parent for purposes of exercising general jurisdiction over the parent.

Rather, formally distinct corporations should presumptively be regarded as separate for jurisdictional purposes. Commercial and investment activity in this country relies on a widely shared understanding, now firmly embodied in law, that parent and subsidiary corporations possess separate juridical personalities. See *Anderson*, 321 U.S. at 362 ("Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."). This Court has recognized that principle in general (see, *e.g.*, *First Nat'l City Bank* v. *Banco Para El Commercio Exterior de Cuba*, 462 U.S. 611, 628 n.19 (1983) (*Bancec*)), and it has particular support in the Court's personal jurisdiction cases. See, *e.g.*, *Keeton*, 465 U.S. at 781 n.13 (emphasizing, in a case involving affiliated corporate defendants, that "[e]ach defendant's contacts with the forum State must be assessed individually").

But that baseline of separate corporate personality has always been qualified, most prominently in the field of substantive liability. Thus, for example, this Court has held in a number of cases applying federal law that "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is

created, * * * one may be liable for the actions of the other," and that the corporate form "will not be regarded when to do so would work fraud or injustice" or "where it is interposed to defeat legislative policies." *Bancec*, 462 U.S. at 629-630 (citations omitted); see note 8, *supra* (noting array of federal laws that disregard or give only qualified regard to separate corporate personality).

Such background principles of federal law (when applicable), and the corresponding principles of state substantive law that speak to the circumstances in which a parent corporation is responsible for the acts of its subsidiary, would generally be a sound basis for attributing the subsidiary's contacts to its parent for the purpose of exercising general jurisdiction.[9] As we have previously suggested (U.S. *Goodyear* Br. at 26 n.9), that approach in practice permits the attribution of a corporate subsidiary's contacts to its parent if state substantive law would treat the two corporations as one for all purposes (*i.e.*, treats them as alter egos), or if the subsidiary acted as a traditional agent to establish contacts on behalf of its parent as principal (to the extent of its agency and its contacts).[10] See also Pet. Br. 21-22 (alter ego); *id.* at 27-29 (agency).

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[9] Merely attributing contacts of a subsidiary to its parent does not, of course, answer the ultimate general-jurisdiction question of whether the foreign parent is "essentially at home" in the forum. Contacts of the nature, diversity, magnitude, and continuity necessary for an assertion of general personal jurisdiction may in practice more often be found in a juridical person's direct contacts with a forum than in those contacts attributed to it from another juridical person.

[10] Although general jurisdiction must be decided without reference to the particular claim at issue, questions of specific jurisdiction would be informed not only by generally applicable alter ego and

Those traditional alter ego and agency principles are very likely to comport with due process. They are deeply embedded in our legal structure, and their general contours are similar (though not identical) from State to State.[11] They have proven to be predictable enough in application that there is no serious claim that they are arbitrary or unfair. And they are among the legal doctrines that commercial actors already account for because they govern matters of substantive liability in a wide range of contexts.

5. The Ninth Circuit's approach to attribution of contacts fails to satisfy due process

As articulated by the court of appeals, the contacts of a subsidiary may be attributed to its parent for jurisdictional purposes when (1) "the subsidiary * * * performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar ser-

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agency principles, but also by the particular law creating the cause of action. For example, due process would ordinarily permit the exercise of specific personal jurisdiction over a parent corporation on a claim under a law providing that a subsidiary's owner is liable for environmental damage caused by the subsidiary. Cf. *Bestfoods*, 524 U.S. at 61-64 (allowing for the possibility of such a "derivative * * * liability" statute).

[11] Reference to state law can raise choice-of-law questions, but analogous questions already arise in imposing substantive liability on veil-piercing, corporate-successor, and agency theories. Compare, *e.g.*, *Tomlinson* v. *Combined Underwriters Life Ins. Co.*, No. 08-cv-259, 2009 WL 2601940, at *2-3 (N.D. Okla. Aug. 21, 2009) (following veil-piercing law of State of subsidiary's incorporation), with, *e.g.*, *Chrysler Corp.* v. *Ford Motor Co.*, 972 F. Supp. 1097, 1101-1105 (E.D. Mich. 1997) (following successor liability law of State with most significant interest).

vices," and (2) there exists "an element of control" of the subsidiary by the parent. Pet. App. 21a-22a (citation and emphasis omitted). That approach is defective in two respects.

First, the Ninth Circuit's approach has no foundation in any state or federal law that governs the subsidiary-parent relationship more generally and that might reasonably have set petitioner's expectations about its responsibility for the California conduct of a New Jersey-based Delaware LLC (MBUSA) owned by petitioner's Michigan-based Delaware-chartered corporate holding company subsidiary (DCNAHC). Rather, that test ultimately traces to turn-of-the-century New York courts' practice of taking jurisdiction over any foreign corporation doing business in New York. See pp. 14-15, *supra*. Nothing about such an approach is calculated to identify the background principles of law against which the jurisdictional consequences of petitioner's relationship with MBUSA should be judged.

Second, the Ninth Circuit's approach is too malleable, ill-defined, and subjective to give a parent corporation fair and sufficiently predictable notice of when its subsidiary's forum contacts will be attributed to it. Indeed, the Ninth Circuit's caselaw itself was so unclear that the district court's decision (Pet. App. 113a-115a), the original panel decision (*id.* at 54a-57a), Judge Reinhardt's original dissenting opinion (*id.* at 62a-66a, 70a-72a), and the substituted panel opinion (*id.* at 20a-23a) each articulated a different combination of considerations.

The test the court of appeals ultimately applied forces a potential corporate-parent defendant to predict what activities a court might believe at some future time were "sufficiently important" to it, and whether a court would think that the parent would take over (or "sub-

stantially" take over) if it could not rely on its subsidiary to engage in those "important" activities. As shown by the differing views at different times of the four lower-court judges to hear this case (not to mention the eight judges dissenting from the denial of rehearing en banc), a persuasive case for the satisfaction (or not) of that test might be made on almost any record.

Layered over that uncertain inquiry would be the question whether the parent corporation has "an element of control" over the subsidiary. Inasmuch as the court of appeals refused to "define the precise degree of control required to meet that test or establish any particular method for determining its existence," Pet. App. 22a n.12, potential defendants could not hope to reliably predict the jurisdictional consequences of their business arrangements with corporate affiliates. The pervasive indeterminacy of the Ninth Circuit's approach does not "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen*, 444 U.S. at 297, and it "offend[s] traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316, for that reason as well. It is therefore not a permissible basis on which to exercise general personal jurisdiction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-965

In The
Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AND THE ASSOCIATION OF GLOBAL AUTOMAKERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The Alliance of Automobile Manufacturers, Inc. ("the Alliance") is a nonprofit trade association of car and light truck manufacturers, whose members include BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda North American Operations, Mercedes-Benz USA, Mitsubishi North America, Porsche Cars North America, Toyota Motor North America, Inc., Volkswagen Group of America, Inc. and Volvo Car Corporation.

The Association of Global Automakers ("Global Automakers"), formerly known as the Association of International Automobile Manufacturers (AIAM), is a nonprofit trade association whose members include the U.S. manufacturing and distribution subsidiaries of 13 international motor vehicle manufacturers, including: American Honda Motor Co., Inc., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Inc., Isuzu Motors America, LLC, Kia Motors America, Inc., Maserati North America, Inc., McLaren Automotive, Ltd., Nissan North America, Inc., Peugeot Motors of America, Subaru of America, Inc.,

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[1] Pursuant to S. Ct. Rule 37.6, counsel of record for *amici curiae* states that no counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amici curiae* has made a monetary contribution intended to fund the preparation or submission of this brief. The parties' letters of consent to the filing of this brief have been filed with the Clerk.

Suzuki Motor of America, Inc. and Toyota Motor North America, Inc.

The mission of the Alliance and of Global Automakers is to protect and promote the legal and policy interests of their members. As noted above, *Amici's* members include global companies which design, manufacture and sell vehicles in various parts of the world and which utilize distributorship arrangements to conduct business in this country, as well as U.S. manufacturing and distribution subsidiaries of international vehicle manufacturers. The jurisdictional issues presented in this case are therefore of major importance to *amici's* member companies, who are uniquely positioned to provide needed guidance to this Court.

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit Court of Appeals held that twenty-two Argentinian citizens or residents may obtain general personal jurisdiction in California over DaimlerChrysler AG, now known as Daimler AG, a German corporation, under an implied agency fiction, based solely on the alleged presence in California of Mercedes-Benz USA, LLC ("MBUSA"), an indirect subsidiary of Daimler AG, even though plaintiffs' claims are entirely unrelated to, and do not arise from, any contacts with California by either Daimler AG or MBUSA. The events at issue took place more than 30 years ago, halfway around the world in Argentina. None of the events giving rise to this suit occurred in California, or even the United States. None of the plaintiffs is an American citizen and there is no meaningful

connection between the parties or the facts of this case and California. One might properly ask, "What is such a case doing in the courts of the U.S.?" Yet, the Ninth Circuit held that Daimler AG is subject to general jurisdiction in California because MBUSA is purportedly an "agent" of Daimler AG for jurisdictional purposes.

This ruling constitutes an unprecedented vast expansion of personal jurisdiction over foreign corporations and an undermining of the concept of separate corporate identity. It sets a dangerous precedent with extremely troublesome implications not only for *amici's* members, both here and abroad, but for virtually all manufacturers abroad whose products are distributed in this country by American subsidiaries or totally independent parties. This holding, if upheld by this Court and applied by other federal and state courts, would permit American courts to exercise what amounts to universal jurisdiction over nonresident corporations "in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world." *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003) (emphasis in original).

This Court has rejected such a vast and unprecedented view of general jurisdiction as not consonant with Due Process. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, __U.S. __, 131 S. Ct. 2846, 2856, 180 L. Ed.2d 796, 809 (2011) (rejecting "sprawling view of general jurisdiction" under which "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.")

Beyond the blatant incompatibility with this Court's doctrine, and the manifest existence of a split in authority among the various Circuits with respect to purported "agency" jurisdiction, critical policy considerations militate against the essentially limitless view of general jurisdiction adopted by the Ninth Circuit. These policy considerations include: the chilling effect upon business activity and investment; the adverse effects upon international comity; the risk of retaliation by the legislatures and courts of foreign countries against U.S. companies; the open invitation to counsel anywhere in the world to engage in forum shopping in the U.S. on claims irrelevant to the U.S.; and the damage to the federal government's ability to conduct foreign relations and to negotiate treaties.

Failure by this Court to overrule the Ninth Circuit and to reaffirm and apply the traditional limitations regarding general jurisdiction would significantly increase the exposure of foreign businesses to lawsuits in the U.S. arising out of events and activities not even remotely related to contacts of those foreign businesses with the forum. Not only would this risk a flight of foreign companies doing business or investing in the U.S., but U.S. federal and state courts could be deluged with litigation having no connection to the U.S. Plaintiffs' counsel would be permitted to select a favorable U.S. forum in which to litigate any claim arising worldwide, simply because the target foreign defendant has a "relationship" with a separate company located in the selected U.S. forum, although the forum has nothing to do with the claim.

Amici urge this Court to reject the Ninth Circuit's overreaching assertion of universal general jurisdiction over any company in the world which has a relationship with subsidiaries, affiliates or independent contractors in the United States. We urge this Court to adhere to its historical and longstanding limitations on the exercise of personal jurisdiction by American courts over nonresident corporations.[2]

FACTUAL AND PROCEDURAL BACKGROUND

Amici adopt the statements of fact set forth in Daimler AG's Brief.

ARGUMENT

I

THE NINTH CIRCUIT'S DECISION UNDERMINES THE LIMITATIONS WHICH DUE PROCESS PLACES ON A COURT'S EXERCISE OF "GENERAL" PERSONAL JURISDICTION.

A. The Decision Abrogates the Due Process Mandate that the Required Minimum

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[2] In view of the comments by this Court in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2012), any attempt to utilize the Alien Tort Statute (ATS) as a basis for jurisdiction here is misplaced. As this Court observed, the history of that statute shows that Congress did not expect that causes of action would be brought under the ATS for violations of the law of nations occurring abroad. Rather, the statute was enacted primarily to deal with piracy, violation of safe conducts, and infringement of the rights of ambassadors, none of which is involved here.

Contacts with the Forum State Must Be Assessed for Each Defendant Individually.

The Constitutional right to Due Process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-472 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Due Process requires that, for a nonresident corporate defendant to be subjected to general personal jurisdiction, it must have certain minimum contacts with the forum, such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Helicopteros Nacionales de Colombia, S.A., v. Hall*, 466 U.S. 408, 414 (1984), quoting *International Shoe*, 326 U.S. at 316. This requirement of minimum contacts ensures that the defendant has "fair warning" that its decision to engage in certain activities may subject it to a foreign court's jurisdiction. *Burger King*, 471 U.S. at 472.

"Specific jurisdiction," as opposed to "general jurisdiction," is the exercise of "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros*, 466 U.S. at 414 n.8. Here, indisputably, there is no basis for specific jurisdiction over Daimler AG, since plaintiffs' suit does not arise out of or relate to any activities or contacts by Daimler AG, or even by any subsidiary of Daimler AG, with California.

General jurisdiction extends to cases "not arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.9. However, this Court has instructed that the defendant's activities in the forum state must be sufficiently "continuous and systematic" as well as "substantial" to make the assertion of general jurisdiction reasonable. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-46 (1952). As *Goodyear Dunlop Tires Operations, S.A. v. Brown, supra* declares, the defendant must be "at home" in the forum for general jurisdiction to apply (131 S. Ct. at 2854, 180 L. Ed.2d at 806).

The "substantial, continuous and systematic" contacts and "at home" standard for general jurisdiction is a demanding one. It is considerably more stringent than that employed for specific jurisdiction. See *Burnham v. Superior Court of California*, 495 U.S. 604, 610, 618 (1990) (plurality opinion); *Burger King*, 471 U.S. at 472-73 and n. 15; *Helicopteros*, 466 U.S. at 415. This much higher burden is necessitated because of the far-reaching consequences to a defendant that accompany the exercise of general jurisdiction, through which a defendant can be compelled to appear and defend an action that has nothing to do with any activities with the forum (see, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown, supra*, 131 S. Ct. at 2855-2857).

This Court has also made clear that the relevant jurisdictional contacts are to be assessed for the defendant individually. See, e.g., *Burger King*, 471 U.S. at 475 ("Jurisdiction is proper...when the contacts proximately result from actions by the defendant *himself* that create a substantial

connection with the forum" [emphasis in original]); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) ("Each defendant's contacts with the forum State must be assessed individually.").

That test is not satisfied here. Daimler AG did not carry on "continuous and systematic" activities in California, nor is it "at home" in California. The happenstance that MBUSA, an indirect subsidiary of Daimler AG, may be "present" and engage in business in California is irrelevant to the general jurisdiction analysis with respect to Daimler AG. This Court held in *Helicopteros* that "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts" (466 U.S. at 417).

This Court's test for general jurisdiction focuses on two prongs: the purposeful actions of the defendant itself in the forum and the nature of the defendant's contacts with the forum, both of which the Ninth Circuit's decision disregards. The Ninth Circuit's holding fails to meet the stringent minimum contacts test and also violates this Court's continued instruction that the requisite minimum contacts "must be met as to *each defendant* over whom a state court exercises jurisdiction" (*Rush v. Savchuk*, 444 U.S. 320, 332 [1980] [emphasis added]), and that "Each defendant's contacts with the forum State must be assessed *individually*" (*Keeton*, *supra*, 465 U.S. at 781 n. 13 [emphasis added]).

B. The Ninth Circuit's Decision Ignores Precedent from this Court Mandating Recognition of and Respect for the Distinction Between Separate Corporate Entities.

The Ninth Circuit's holding further violates this Court's recognition that "respect for corporate distinctions" is a bedrock principle of law which is "deeply engrained in our economic and legal systems." *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). Pursuant to this principle, a corporation generally will not be held liable for the acts of its subsidiaries or other affiliated corporations. *Ibid*; see also, *Janus Capital Group, Inc. v. First Derivative Traders*, __U.S.__ , 131 S. Ct. 2296, 2304, 180 L.Ed.2d 166, 177 (2011) (rejecting liability for investment advisor based on statement made by its mutual fund client, even though there was a close corporate relationship between the two, and stating that "We decline this invitation to disregard the corporate form"). The forceful reiteration of this directive in *Goodyear* does not permit the disregard with which it is treated by the Ninth Circuit.

This principle applies not only with respect to the issue of vicarious liability, but equally to the issue of personal jurisdiction. Thus, in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335-337 (1925), jurisdiction over a foreign corporation based on its subsidiary's forum contacts was squarely rejected, even though the parent dominated the subsidiary "immediately and completely." 267 U.S. at 335.

In *Cannon*, the North Carolina plaintiff sued a Maine-based corporation in North Carolina for breach of contract. The plaintiff sought to impute the jurisdictional contacts of the defendant's wholly-owned subsidiary, which functioned as an "instrumentality employed to market [the Maine corporation's] products within [North Carolina]." *Id.* at 335. Although the Maine corporation exercised total control over its subsidiary, and the subsidiary performed the same marketing and distribution functions that the parent itself performed in other states (*Id.* at 335), this Court held that the distributor relationship did not create jurisdiction over the parent for claims unrelated to the subsidiary's contacts with the forum.

In so holding, this Court noted that the separate corporate existence of the two companies had been properly observed by the defendant and its subsidiary (*Id.* at 335). Said this Court, "The corporate separation, though perhaps merely formal, was real. It was not pure fiction" (*Id.* at 337). This Court noted that the Maine corporation wanted to have business transactions with persons resident in North Carolina, "but for reasons satisfactory to itself did not choose to enter the State in its corporate capacity." (*Id.* at 336). While this corporate separation "was doubtless adopted solely to secure to the defendant [Maine corporation] some advantage" (*Id.* at 335), a corporation of one state is not amenable to suit in the federal court for another state in which the plaintiff resides whenever it employs a subsidiary corporation as the instrumentality for doing business there (*Id.* at 336). This Court noted that the use of a subsidiary for

such purposes does not necessarily subject the parent corporation to jurisdiction. (*Id.*). Indeed, the Maine corporation might have conducted such business through an independent entity without subjecting itself to jurisdiction. (*Id.*). This Court concluded that, for purposes of jurisdiction, the business of the subsidiary in North Carolina did not become the business of the parent Maine corporation.

Notably, this Court in *Keeton*, 465 U.S. at 781 n. 13, explained that "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary. Each defendant's contacts with the forum State must be assessed individually" (citations omitted). If jurisdiction over a parent corporation does not automatically establish jurisdiction over a wholly-owned subsidiary, then, *a fortiori*, jurisdiction over a wholly-owned subsidiary, or a company with an even more remote connection to the defendant (such as an independent distributor), likewise cannot establish jurisdiction over a non-resident company. See also, *Phila. & Reading Ry. v. McKibbin*, 243 U.S. 264, 268 (1917) ("Nor would the fact...that 'subsidiary companies' did business within the state, warrant a finding that the defendant did business there.").

The Ninth Circuit's decision appears to state that a different standard may be applied with respect to corporate separateness when the issue of personal jurisdiction over the parent corporation is at stake, as opposed to vicarious liability of the parent corporation for the acts of its subsidiary (644 F.3d 909). But the Ninth Circuit provides no explanation as to why, if a parent corporation cannot

be held liable based on the activities of its subsidiary, it itself can be held subject to personal jurisdiction on the basis of these same activities.

Should there be any concern about potential misuse of the corporate form, this Court has instructed that "the corporate veil may be pierced...when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes...." *Bestfoods*, 524 U.S. at 62. Here, it is undisputed that Daimler AG and MBUSA adhere to all the legal requirements necessary to maintain their separate corporate identities and there is no contention that they have misused the corporate form.

The Ninth Circuit's decision thus runs counter to, and cannot be reconciled with, this Court's emphatic recognition of the concept of separate corporate entities. The Ninth Circuit's decision, which finds general jurisdiction based on the actions and contacts with the forum of an entity other than the defendant, also violates this Court's repeated admonitions regarding the need for a separate due process analysis as to each defendant "individually" and the need to respect corporate distinctions. See, e.g., *Keeton*, 465 U.S. at 781 n. 13; *United States v. Bestfoods*, 524 U.S. 51, 61-62.

C. The Ninth Circuit's Assertion of General Jurisdiction on an Implied Agency Theory Effectively Has No Limitations.

The Ninth Circuit's finding of general jurisdiction over Daimler AG because of contacts which its indirect subsidiary, MBUSA, has with

California, appears to be rooted in the court's erroneous belief that MBUSA is an "agent" of Daimler AG for any and all unrelated matters. It is undisputed that none of MBUSA's contacts or activities in California had anything to do with the plaintiffs' suit.[3]

The breathless sweep of the Ninth Circuit's decision propounding the purported "agency" theory of general jurisdiction violates Due Process, as it effectively has no limitations. The Ninth Circuit pronounced that Daimler AG was subject to general jurisdiction because "the services that MBUSA currently performs are sufficiently important to DCAG [Daimler AG] that they would almost certainly be performed by other means if MBUSA did not exist, whether by DCAG performing those services itself or by DCAG entering into a new agreement with a new subsidiary or a non-subsidiary national distributor for the performance of those services." As Judge O'Scannlain noted in his dissent, however, this is an illusory standard

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[3] The Ninth Circuit stated in its decision (644 F.3d at 921) that its "agency" test for personal jurisdiction over a foreign corporation on the basis of its subsidiary's contacts with the forum has its origins in case law from the Second Circuit. The Ninth Circuit first adopted the agency theory in *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 423 (9th Cir. 1977), which relied extensively on *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967), among others. However, the *Gelfand* case involved specific jurisdiction, not general jurisdiction. The Fourth, Fifth, Sixth, Seventh and Eighth Circuits have categorically rejected the purported "agency" theory of personal jurisdiction propounded by the Ninth Circuit (see discussion in Daimler AG's Brief), dispatching plaintiffs' argument below that the Ninth Circuit's "agency" theory of jurisdiction is "mainstream."

because "Anything a corporation does through an independent contractor, subsidiary or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist."

The Ninth Circuit went on to state in the decision that whether the alleged agent was a subsidiary of the principal or independently owned is "irrelevant." Said the court, "Independent contractors may be considered representatives." Under the Ninth Circuit's reasoning, contracting with an independent entity to distribute cars in the United States would meet the "sufficiently important test," and if Daimler AG were to replace MBUSA with an independent entity, that entity, according to the Ninth Circuit, would still be considered a representative, i.e., an "agent," of Daimler AG, subjecting Daimler AG to general jurisdiction. The court then stretched this extraordinary concept of MBUSA's alleged "representation" or "agency" to events which occurred more than 30 years earlier, thousands of miles away, which had nothing to do with distributing cars in the United States.

Under the Ninth Circuit's expanded "agency" or "representative" test, every relationship that a foreign corporation has with a subsidiary, independent contractor or distributor in the forum would potentially subject it to general jurisdiction. The Ninth Circuit's decision cannot be squared with this Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, *supra*, 267 U.S. 333, 335-337. There, the parent corporation exercised total control over its subsidiary, and the subsidiary performed the same marketing and distribution functions that the parent

itself performed in other states (*Id.* at 335). This Court, nevertheless, held that the distributorship relationship did not create jurisdiction over the parent for claims unrelated to the subsidiary's contacts with the forum. This Court further stated in *Cannon* that the parent corporation might have conducted such business in the forum state through an independent entity, without subjecting itself to jurisdiction.

Not only is the Ninth Circuit's "agency" or "representative" test purely illusory and all-inclusive, the decision further waters down the concept of distinct corporate identity by indicating that a foreign corporation may be subject to general jurisdiction even where no control is exercised over the subsidiary or distributor which is acting independently, as long as the foreign corporation has an unexercised right of control. Under this approach, there would be virtually universal jurisdiction in every American court over every significant foreign or domestic manufacturer. Moreover, because the jurisdiction would be *general*, it would exist without regard to the nature of the claim. Jurisdiction would be available, not only in every state and federal court, but "in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world." *Purdue*, 338 F.3d at 787. Such an expansive exercise of general jurisdiction is not consonant with Due Process. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown, supra*, __U.S. __, 131 S. Ct. at 2856, 180 L. Ed.2d at 809.

D. The Ninth Circuit's Assertion of General Jurisdiction Based on an Implied Agency Theory Has No Foundation in the Traditional Law of Agency.

In effect, the Ninth Circuit's decision impermissibly removes any distinction between subsidiaries, independent distributors and true agents. However, "distributors," "agents" and "subsidiaries" can be very different legal entities and have differing legal relationships with a manufacturer. See 1 W.M. Garner, *Franchise and Distribution Law and Practice* §§1:11 to 1:31, at 22-36 (2010) (distinguishing among distributorships, dealerships, agency relationships and manufacturer's representatives, among other things).

The General Distributor Agreement between Daimler AG and MBUSA bears none of the hallmarks of an agency relationship. As noted in 1 W. Garner, Franchise & Distribution Law and Practice §1.29 (2012), in an agency relationship, the "agent represents the supplier and stands in its shoes; it usually does not have a separate legal identity from that of the supplier. The agent is responsible for selling the product to customers and for collecting the purchase price. An agent does not bear the risk of loss of the product or of collection from the customer....The agent will usually be compensated through a salary and commission."

In contrast, a "dealer or distributor agreement usually provides that the dealer is an independent contractor and that neither party is the agent of the other for any purpose." Garner, *supra*, at §3.6. A

distributor generally purchases the product from the manufacturer, and title then passes from the manufacturer to the distributor. The distributor passes title to the customer when the distributor sells the product on its own behalf. In contrast, in a sales agency relationship, the agent does not take title to the product but rather, arranges direct sales between the manufacturer and the customer. *United States v. Gen. Elec. Co.*, 272 U.S. 476, 484 (1926); *Cannon, supra*, 267 U.S. at 251.

Here, there can be no dispute that MBUSA has a "separate legal identity" from Daimler AG and that it does not "stand in the shoes" of Daimler AG. Further, the General Distributor Agreement specifically provides that MBUSA is an "independent contractor" that "shall buy and sell Contract Goods...as an independent business for [its] own account" and that it is not a "general or special agent, partner, joint venture, or employee" of Daimler AG (Agreement Art. 11.1[1]). As further recognized by the Ninth Circuit in its original decision, Daimler AG sells its vehicles, manufactured in Germany, to MBUSA in Germany, where title passes to MBUSA (*Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1092 [9th Cir. 2009] [withdrawn opinion]).

This Court has further held that, in determining whether a corporate entity is a true agent, the Court should examine whether the purported agent can bind the principal by its actions. *Commissioner v. Bollinger*, 485 U.S. 340, 346-347 (1988). Here, the General Distributor Agreement between MBUSA and Daimler AG specifically provides that MBUSA has no authority to make

binding obligations for or act on behalf of Daimler AG (Agreement Art. 11.1[2]).

The Ninth Circuit's decision turns the traditional law of agency on its head. The Restatement (Third) of Agency §1.01 (2006) provides that

> "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."

Here, the General Distributor Agreement between Daimler AG and MBUSA specifically disavows any agency relationship on the part of MBUSA. This is the case with most distributor agreements. See Garner, *supra* §3:6 ("The dealer or distributor agreement usually provides that the dealer is an independent contractor and that neither party is the agent of the other for any purpose."). Not only did the General Distributor Agreement explicitly disavow an agency relationship, there is no evidence that Daimler AG "manifested assent" to or designated MBUSA as its agent, particularly for events which took place in a distant country over 30 years ago. Nor is there any evidence that MBUSA agreed to serve as Daimler AG's agent. Thus, the Ninth Circuit's decision in this case stands upon the thin reed of the fiction of an untenable implied agency.

What is more, the Ninth Circuit departed from its prior precedent. In its place, the Ninth Circuit vastly inflated its jurisdictional reach when it held that a foreign parent's "right to control" a domestic subsidiary is sufficient to support general jurisdiction based on agency, whether or not it ever actually exercised that right. Prior Ninth Circuit decisions held that the mere right to control another corporation is not sufficient to establish agency and that actual exercise of control is required. See, *e.g.*, *Doe v. Unocal Corp.*, 248 F.3d 915, 926; *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980).

The Ninth Circuit's abrogation of the need for actual control violates Due Process. Such absence of control contradicts the Due Process requirement for "continuous, systematic and substantial" contact by the foreign corporation with the forum state. See, *e.g.*, *Perkins*, 342 U.S. at 448 (defendant must undertake in the state "continuous and systematic supervision" of its employees' activities from within the forum state). It is only where the corporate defendant has engaged in an exceptional sort of supervision and control of corporate activities in the forum state that general jurisdiction may be asserted (*Perkins, supra*). Where such exceptional supervision and control is absent, general jurisdiction is lacking (*Helicopteros, supra*.)

Neither the District Court nor the Ninth Circuit found that Daimler AG exercised such exceptional day to day control over MBUSA or even had the right to exercise such day to day control over MBUSA. The General Distributor Agreement specifically disavows any agency. More than that, it

provides that either party may terminate the Agreement; that MBUSA's goals are negotiated by both parties; that MBUSA can decide not to buy certain classes of vehicles; and that Daimler AG has no control over the product's ultimate destination (579 F.3d at 1096).

In determining that MBUSA was the "agent" of Daimler AG, the Ninth Circuit pointed to certain quality control provisions in the General Distributor Agreement between Daimler AG and MBUSA, by which Daimler AG reserved various rights. Among other things, these included the right to approve MBUSA's authorized resellers and the location of retail sales outlets, showrooms and service facilities, and required MBUSA's observance and maintenance of certain standards and requirements. Contrary to the Ninth Circuit's apparent belief, these quality control contractual provisions do not serve to make MBUSA the "agent" of Daimler AG.

Quality control contractual requirements, such as those referred to above, are common provisions in distributor agreements. See Garner, *supra*, at §3.6. Manufacturers have a cognizable interest in assuring that quality control is exercised by the distributors of their products. Indeed, trademark protection depends on the existence of such quality control protections.

As noted in 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §18.42 (4th ed. 2011):

> "A trademark carries with it a message that the trademark owner is controlling the nature and quality of the goods or

> services sold under the mark....A product is not truly 'genuine' unless it has been manufactured and distributed under quality controls established by the manufacturer....Thus, not only does the trademark owner have the right to control quality, when it licenses, it has the duty to control quality."

As Judge Posner has further noted,

> "The owner of a trademark has a duty to ensure the consistency of the trademarked good or service. If he does not fulfill this duty, he forfeits the trademark....The purpose of a trademark, after all, is to identify a good or service to the consumer, and identity implies consistency and a correlative duty to make sure that the good or service really is of consistent quality, i.e., really is the same good or service." *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 435 (7th Cir. 1989).

Surely, foreign manufacturers should not be required to sacrifice such trademark protections in order to avoid the unbounded exercise of general jurisdiction by U.S. courts.

In effect, the Ninth Circuit's "global enterprise" theory of jurisdiction treats the foreign corporation and its subsidiaries/distributors as a single entity. In erasing the limitations of Due Process, it would provide American courts with judicial authority over every significant

manufacturer's global conduct. Such an unrestrained exercise of universal jurisdiction fails the "reasonableness" test of *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), and violates "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316.

II

IF NOT CORRECTED, THE NINTH CIRCUIT'S DECISION WOULD RENDER ANY MANUFACTURER SUBJECT TO SUIT IN ANY JURISDICTION IN THE U.S. IN WHICH IT HAS AN AFFILIATE OR SUBSIDIARY, REGARDLESS OF WHERE THE CLAIM AROSE.

Due Process jurisdictional limitations provide "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). These concerns require a common sense rationale as to why the U.S. courts should be prepared to decide any dispute involving a foreign manufacturer which conducted business in the U.S., whether directly or through an affiliate/subsidiary, for any claim that arose anywhere in the world from the actions of another affiliate/subsidiary. The Ninth Circuit offered no such rationale.

Here, Daimler AG had no way to foresee that the alleged California contacts of an indirect subsidiary, MBUSA, could subject it to liability for activities purportedly engaged in by another indirect subsidiary in Argentina in the 1970s, and that, as a result of MBUSA's contacts with California, Daimler AG can be sued in California for those activities. Moreover, that the California court should be required to resolve such claims where they relate to activities in Argentina, involve Argentinian law, require Argentinian witnesses and have absolutely no relationship to California or to the California affiliate/subsidiary, is mind-boggling and violates Due Process.

Under the Ninth Circuit's decision, there is almost nothing a foreign manufacturer, whose products are sold in the U.S., can do to minimize the risk of litigation in the forum. The only way that such a manufacturer might potentially avoid suit in a given state in the U.S. would be to avoid the state entirely, closing any subsidiaries in the state and avoiding relationships with distributors in the state. The resulting adverse impact upon the U.S. economy is obvious.

Companies such as *amici's* members, whose products are sold worldwide, utilize a variety of business structures and arrangements, including distributor agreements. The Ninth Circuit's decision permitting jurisdiction over a nonresident manufacturer, where it utilizes a completely independent distributor or an independently operating conventional corporate subsidiary in the forum state, causes well-justified concern to *amici's* members. It affects long-existing structures, as well

as prospective distributor agreements with independent and subsidiary entities in the U.S.

As Justice Ginsburg noted in her dissent in *J. McIntyre Mach., Ltd. v. Nicastro*, __U.S.__, 131 S. Ct. 2780, 2799, 180 L.Ed.2d 765 (2011), arrangements such as the one here between Daimler AG and MBUSA, through which a foreign-country manufacturer utilizes a U.S. company to distribute its products, are "common." While some have mischaracterized these distributor relationships as calculated tactics by foreign manufacturers to avoid U.S. jurisdiction, there are solid and compelling business reasons why foreign manufacturers engage U.S. distributors, which have nothing to do with jurisdictional issues.

Among other reasons, a U.S. distributor is far more likely than a foreign manufacturer to have knowledge of American laws, regulations, business practices, culture and buying preferences. A U.S. distributor such as MBUSA would be far better equipped than a German-based manufacturer to negotiate American laws and requirements regarding such matters as tax collection, licensing requirements, compliance with federal safety regulations and vehicle importation customs requirements, among other things.

The distribution arrangements between foreign manufacturers and U.S. distributors provide significant benefits to the U.S. economy. U.S. subsidiaries of foreign companies employ 5.6 million Americans and support an annual payroll of $408 billion. Organization for International Investment, Insourcing Facts, available at

http://www.ofii.org/resources/insourcing-facts.html (last visited June 11, 2013). These jobs provide an average compensation per worker of $77,409, more than 36% higher than the economy-wide average. *Id.* Such corporations employ approximately 34 percent of the U.S. motor vehicle industry, 31 percent of the U.S. chemicals industry and 24 percent of the U.S. primary metals industry. *Id.*

These U.S. subsidiaries of global companies add $649.3 billion in value to the U.S economy. Further, they purchase goods and services worth hundreds of billions of dollars every year from local suppliers and small businesses across the U.S. *Id.* These corporations pay 14 percent of U.S. federal corporate income taxes and invest an annual $149 billion on property, plant construction and new equipment, accounting for 14.4 percent of all non-residential capital investment made in the U.S. *Id.*

The Ninth Circuit's decision threatens to bring about a dampening effect on foreign investment in the U.S., with consequent deleterious effects upon the American economy. According to a report issued by the U.S. Department of Commerce entitled "The U.S. Litigation Environment and Foreign Direct Investment – Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty" (hereinafter, "Department of Commerce Report"), the high legal cost of doing business in the U.S. and the unpredictable nature of liability in the U.S. are major concerns to foreign corporations considering whether to invest or continue to invest in the U.S. The Report notes at page 5 that

> "Two areas stand out to international investors: (a) the comparatively high legal cost of doing business in the U.S. market and (b) the unpredictable and unfamiliar nature of liability in the United States. Each is directly related to the litigious nature of the U.S. legal system. Each is relevant for assessing whether foreign companies will choose to make investments in the U.S. economy or, if an international company is already doing business there, to what extent the company will choose to continue to fund its U.S. businesses instead of subsidiaries doing business in other parts of the world."

According to the Department of Commerce Report, there is an international perception that the pervasive nature of litigation in the United States and other related aspects of the legal system increase the costs of doing business and add uncertainty (*Id.* at page 1). The Report notes that U.S. tort costs as a percentage of GDP are triple that of France and the United Kingdom and at least double that of Germany, Japan and Switzerland, making this issue "an important U.S. competitiveness concern." (*Id.*).

The Department of Commerce Report observes at page 2 that

> "Fear of litigation is among the top issues listed by senior executives who manage internationally owned U.S. businesses. Significantly, U.S.-owned

> companies that operate in other advanced economies do not express a similar concern. Also, there is the perception that, at least in some contexts, other countries' legal systems are more predictable and that the legal costs of doing business are substantially less. These perceptions exist even though the overall high quality of the U.S. legal system is also well recognized internationally.
>
> "Policymakers need to address the international concerns involving the U.S. litigation environment. If high U.S. legal costs are not commensurate with high benefits, policymakers will need to find ways to reduce uncertainty and to bring U.S. legal costs more in line with those of other advanced economies."

While the Department of Commerce Report notes that the U.S. is the world's largest recipient of foreign direct investment, and that foreign direct investment plays a major role as a key driver of the U.S. economy and as an important source of innovation, exports and jobs, the Report further notes that the U.S. share of global foreign direct investment inflows has declined since the late 1980s and that competition to attract foreign direct investment has become more intense (Department of Commerce Report, p. 2). The Report observes that "Fear of litigation and potential liability under the U.S. legal system are among the more important

concerns to those interested in investing in the United States." (*Id.*).

The Department of Commerce Report further states that

> "Over time, the growth in tort costs has had a competitive impact on the relative cost of doing business in the United States....[T]he United Kingdom and several other industrial countries, including Japan and Switzerland, are now seen as having a significant cost advantage compared to the United States." (Department of Commerce Report, p. 4).

The Department of Commerce Report concludes that the trend of declining U.S. share of global foreign direct investment inflows since the 1980s "reinforces the need for the United States to renew its commitment to open investment and to policies that make this Nation attractive" to foreign direct investment (Department of Commerce Report, p. 3).

A study conducted by David L. McKnight and Paul J. Hinton entitled International Comparisons of Litigation Costs: Europe, the United States and Canada (May 2013), compared liability costs, defined as the cost of claims whether resolved through litigation or other claims resolution processes, as a fraction of GDP across Europe, the U.S. and Canada. The study found that the U.S. has the highest liability costs as a percentage of GDP of the countries surveyed, with liability costs at 2.6 times the average level of the Eurozone economies

surveyed. The study observed that these costs have potential adverse consequences for international competitiveness and productivity, and that litigation also imposes indirect costs stemming from the uncertainty created by litigation, which may deter investment in high-cost jurisdictions.

In a study conducted in April 2008 on behalf of the Organization for International Investment entitled The Insourcing Survey: a CEO-Level Survey of U.S. Subsidiaries of Foreign Companies, top-level executives at major U.S. subsidiaries of foreign companies were surveyed to gauge how the U.S. is perceived as a location for business investment, as compared to other countries. The survey found that 61% of the CEOs of the U.S. subsidiaries surveyed said that the business climate for investing in the U.S. is falling behind other countries, and that 43% of those surveyed stated that the investment climate in the U.S. is getting worse for foreign-based companies.

Moreover, not only are there strong economic reasons to curb unnecessary litigation costs in the U.S., there are also practical reasons to limit rather than expand the jurisdictional bases for resolving disputes involving foreign plaintiffs litigating against foreign defendants for acts arising outside of the U.S., where jurisdiction is predicated on a U.S. affiliate/subsidiary which had no relationship or connection to the claim. It is inefficient and time-consuming to have U.S. courts resolve disputes arising outside the U.S. which are governed by foreign law, which rely upon the testimony of foreign witnesses and records located outside of the jurisdiction (which are frequently in foreign

languages), and which would result in judgments that present enforcement issues and are subject to collateral attacks in foreign jurisdictions.

Companies such as *amici's* members play a vital role in the U.S. economy, employing millions of Americans and pouring billions of dollars into capital investment in the U.S. The Ninth Circuit's decision, if affirmed, provides no benefits to U.S. citizens or to the U.S. economy, increases litigation costs in the U.S., results in the U.S. courts resolving disputes that have no connection to the U.S. and violates the Due Process of foreign corporations. By diverting judicial resources that would otherwise address domestic disputes, the Ninth Circuit decision, if not reversed, will negatively impact our judicial system.

III

THE NINTH CIRCUIT'S ILL-ADVISED DECISION, IF UNCORRECTED BY THIS COURT, WILL HAVE UNDESIRABLE INTERNATIONAL REPERCUSSIONS.

Comity is an essential ingredient in governing the relations between nations. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895). Respect for and confidence in the legal systems of other nations to fairly resolve the legal disputes that are properly within their jurisdictions is a requirement of international comity. The Ninth Circuit's decision violates principles of international comity by permitting U.S. courts to exercise universal jurisdiction over any dispute anywhere, creating an unworkable system which disregards the

sovereign rights of other nations to resolve legal disputes arising within their borders.

Unless there is a recognized and accepted jurisdictional basis for a court to hear a legal dispute, there should be no reason for a court to find jurisdiction. If the rationale of the Ninth Circuit's decision were to be adopted by every country, the consequence would be confusion. Every manufacturer whose products are sold in any country through an affiliate/subsidiary would be subject to suit in that forum, despite the fact that the claim arose in another country through the activities of a different affiliate/subsidiary in that other country. Just as foreign corporations would be exposed to suit in any jurisdiction in the U.S., U.S. corporations would be subject to suit in any foreign country where an affiliate/subsidiary is located. The Ninth Circuit's invasion into the authority of foreign courts would create the risk of inconsistent decisions by different countries, undermining the consistency of international law.

The Ninth Circuit's decision, if affirmed by this Court, would also result in an explosion of worldwide forum shopping. Pursuant to the Ninth Circuit's decision, any dealer or distributor located within the U.S., whether subsidiary or independent contractor, would provide the basis for innumerable potential plaintiffs, who are not citizens of or residents of the U.S., to bring suits against foreign defendants on causes of action which have nothing to do with any activities in the U.S. All that a potential plaintiff would need to do is to locate an entity in the U.S. that deals in the product, has a "relationship" with the defendant, and performs a function that is

"important" to the defendant. Citizens of foreign countries who have claims against manufacturers domiciled in their countries, but who desire to maintain an action in the U.S. because of a more favorable statute of limitations, or the availability of a jury trial or an American measure of damages or some other favorable U.S. law, would be encouraged to forum shop by seeking out any company in the U.S. upon whose contacts general jurisdiction in the U.S. could be sought over the defendant. The practical consequences would be to flood U.S. federal and state courts with lawsuits that have no connection to the U.S., as well as to deter foreign investment in the U.S. See, e.g., Department of Commerce Report at pp. 7-8 (noting that the "U.S. legal system has had a problem with forum shopping" and that "practices such as forum shopping have contributed to [foreign companies'] fear of litigation (and liability) and are seen as a source of significant investor uncertainty.").

Necessarily, if U.S. courts entertain claims arising in foreign countries against entities which never did business in the U.S., they will inevitably need to apply foreign law. Our judiciary is not versed in the law of other countries such as Argentina, which is not only a recipe for error but would also be a significant drain on judicial resources. The Ninth Circuit's decision is thus not only constitutionally wrong, it is ill-advised.

Further, aggressive assertion of jurisdiction over foreign companies risks exposing American companies to retaliatory exercise of jurisdiction by foreign courts. See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21

(1963), noting that expansive application of U.S. law in foreign contexts could "invite retaliatory action from other nations." Several European nations have enacted "retaliatory jurisdictional" laws, which permit the courts of those nations to assert jurisdiction over foreign corporations to the extent that the courts of the foreign corporation's nation would have asserted jurisdiction. See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987).

Consistent with the Ninth Circuit's holding, such retaliatory jurisdiction laws would allow European courts to assert jurisdiction over American companies based on relationships which the American companies have with European subsidiaries or even entirely independent distributors. What is more, because the Ninth Circuit's decision premises jurisdiction over foreign companies based on contacts unrelated to those giving rise to the suit, assertions of such similar jurisdictional predicates in other countries would be virtually without limit. Similar jurisdiction, however, would not be asserted over other members of the European Union, for example, as European law prohibits the application of such laws to citizens of other member countries. Born, *supra*, at 15. The effect would be to penalize American companies and hinder their attempts to gain markets in other countries.

The litigation exposure would be especially profound for companies, such as the members of the Alliance and Global Automakers, which manufacture products distributed worldwide. For example, as shown by its Form 10-K Annual Report for the year

ending December 31, 2010 filed with the United States Securities and Exchange Commission ("SEC"), General Motors Company ("GM") has hundreds of subsidiaries, joint ventures and affiliates located in far-flung places around the world, including Argentina, Australia, Austria, Belgium, Brazil, Chile, China, Colombia, the Democratic Republic of Congo, Ecuador, Egypt, England, Finland, France, Germany, Greece, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Malaysia, Mexico, the Netherlands, New Zealand, Nigeria, the Philippines, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Turkey, United Arab Emirates, Uruguay, Uzbekistan, Venezuela and Vietnam. As demonstrated by its Form 10-K Annual Report for the fiscal year ending on December 31, 2011 filed with the SEC, Ford Motor Company ("Ford") has 161 "significant" non-U.S. subsidiaries located in a similar spread throughout the globe.

This Court has called upon the lower courts "to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction," and the "Federal Government's interest in its foreign relations policies." *Asahi Metal Indus. Co. v. Superior Court*, *supra*, 480 U.S. 102, 115. This Court has also instructed that "'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Asahi*, 480 U.S. at 115, quoting *United States v. First Nat'l Bank*, 379 U.S. 378, 404 (1965).

The expansive exercise of general jurisdiction over foreign companies by American courts impinges upon the sovereignty of foreign nations and frustrates the United States' continued efforts to complete treaties with other nations with respect to the enforcement of judgments and other issues. In its *amicus* brief submitted on appeal in *Goodyear*, *supra*, the United States government observed that:

> "[F]oreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments....The conclusion of such international compacts is an important foreign policy objective of the United States...." (U.S. Br., pp. 33-34; footnote omitted).

The United States government further noted in its *amicus* brief in *Goodyear* that:

> "A State's excessive assertion of general jurisdiction potentially threatens particular harm to the United States' foreign trade and diplomatic interests...." (U.S. Br., p. 12).

As the United States "must speak with one voice when regulating commercial relations with foreign governments" (*Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 [1976]), this Court should reverse the Ninth Circuit's decision.

CONCLUSION

The Ninth Circuit's explosive expansion of general jurisdiction, utilizing the fiction of "implied agency" to justify general jurisdiction over Daimler AG based on the forum contacts of a separate and independent indirect subsidiary MBUSA, contradicts this Court's precedents, flouts traditional American jurisdictional and agency principles, and violates fundamental requirements of Due Process.

The question presented to this Court by Daimler AG is "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state." For the foregoing reasons and those set forth in Petitioner's Brief, *amici* urge this Court to answer the question in the affirmative and to reverse the Ninth Circuit's decision.

Respectfully submitted,

_____

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED[1]

Amicus believes that the Question Presented by this case is more appropriately stated as follows:

When determining whether a court has personal jurisdiction over a corporation, does Due Process permit a court to consider the activities of the corporation's 100% owned subsidiary in the state in which the court is located, so that the subsidiary's activities are treated as if they were the activities of an unincorporated division of the parent corporation for purposes of personal jurisdiction?

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[1] No person other than amicus and its counsel authored or made a monetary contribution to the preparation or submission of this brief.

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INTEREST OF AMICUS

This brief is filed with the blanket consent of all parties.

The American Association for Justice (AAJ) is a non-profit membership organization comprised of lawyers who represent plaintiffs, mainly in personal injury cases, often cases of product liability based on defects in the design and/or manufacture of potentially dangerous products. Some of those products are manufactured in the United States, but often not in the State in which the harm to the plaintiff took place. Other products are made outside the United States and sold in this country, where the injury has occurred. In many cases those products are sold through a separate company that acts as a distributor for the manufacturer, and in some of those cases, as is the case here, the distributor is a wholly-owned subsidiary of the manufacturer.

In most of the product liability cases handled by AAJ members, personal jurisdiction is based on specific, rather than general jurisdiction. This case is framed by petitioner as one involving only general jurisdiction, and even then only one where the defendant is a non-US company and the conduct at issue occurred abroad. But the principal basis on which petitioner asks this Court to hold that there is no personal jurisdiction in this case is that the courts must disregard the activities of a wholly-owned subsidiary in the forum state in assessing whether the parent can be sued there. That principle, if accepted in this case involving only general jurisdiction over a foreign parent, would enable a parent – US or foreign – regardless of whether jurisdiction was general or specific, to avoid suit in a

given state simply by conducting business through a wholly-owned subsidiary. AAJ is filing this brief because that result would cause serious harm to the clients of its members.

INTRODUCTION & SUMMARY OF ARGUMENT

1. Although amicus agrees that the District Court has personal jurisdiction over respondents' claims against petitioner, there is now a question of subject matter jurisdiction that must be addressed either in this Court or on remand. Respondents' complaint included claims under the Alien Tort Statute and the Torture Victims Act, as well as claims arising under International Law and the laws of California. JA 49-50. Because those non-federal claims are only between aliens on one side and a non-US corporation on the other, there is no basis for original alienage jurisdiction under 28 U.S.C. § 1332.

Petitioner DaimlerChrsyler AG ("Daimler") contends that respondents' claims under the two federal statutes have been extinguished by recent decisions of this Court. Pet. Br. 3, n.1. It also asserts that subject matter jurisdiction is still proper, based on supplementary jurisdiction under 28 U.S.C. § 1367. *Id.* Amicus agrees that the non-federal claims were properly before the District Court based on section 1367(a). However, if the federal claims are in fact no longer properly in court – an issue on which it takes no position – then section 1367(c) must be considered to determine whether the non-federal claims should be retained in federal court despite the lack of any remaining federal claims. Questions relating to section 1367(c) are determined in the first instance by district judges exercising their discretion

under all the facts of each case, and amicus believes that the application of section 1367 should be resolved in that manner.

In deciding whether to reach the merits of the personal jurisdiction claim, there is another factor that the Court should consider. When this case was filed, there were two federal question claims in it, and so a motion to dismiss on the ground of forum non conveniens would not have been proper. But if those claims are no longer present, such a motion would now be proper. Moreover, because forum non conveniens is a non-constitutional basis for dismissing this case, it should be preferred to petitioner's request that these claims cannot be adjudicated in California because to do so would violate the Due Process Clause of the Constitution[1]

2. To establish petitioner's connection with California, respondents rely on the fact that petitioner's wholly-owned subsidiary, Mercedes-Benz USA ("MBUSA") does substantial business there, and petitioner does not dispute that MBUSA is subject to suits based on general jurisdiction in California. The principal issue is whether the activities of MBUSA in California can be properly attributed to Daimler in determining whether Daimler is subject to suit in that state.[2]

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[1] For simplicity, and because this case was filed in California, this brief will refer to examples of other cases as if they were all filed in California and that the activities of the defendant's wholly-owned subsidiaries that are being attributed to it for personal jurisdiction purposes, were conducted in California.

[2] Further support for respondents can be found in the Addendum to this brief, which re-produces a letter from Mercedes-Benz dated September 12, 2012, to the California Energy Commission that was on the Commission's public website, http://www.energy.ca.gov/altfuels/notices/draft_

As presented by petitioner, the case involves only issues of general personal jurisdiction and only claims against a non-US corporation. But if this Court accepts Daimler's view of the proper treatment of the relation for personal jurisdiction purposes between a parent and its 100% owned, and hence by definition 100% controlled, subsidiary, the impact will extend to cases of specific jurisdiction and could be used to insulate US, as well as foreign, corporate parents from suits in jurisdictions in which they are doing business through their wholly owned subsidiaries, even from claims by US citizens of that jurisdiction.

Petitioner's defense is based on two propositions that are not disputed: MBUSA is a separate legal entity from petitioner, and all formalities regarding the separation of operations of MBUSA and petitioner have been observed. From them, petitioner argues that the courts must disregard MBUSA's activities in California in determining whether the California courts have personal jurisdiction over petitioner. That is proper, according to petitioner, even though every car that petitioner sells in the United States is initially sold to its subsidiary MBUSA, and then resold to dealers throughout the United States. Amicus and respondents, however, argue that the Court should, for purposes of determining personal jurisdiction, disregard the separate incorporation of wholly-owned

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hydrogen_pon/comments/2012-09-18_Mercedes_Benz_Research_and_Development_North_America_Comment_TN-67179.pdf, along with 70 other items that involve Mercedes-Benz and the Commission, apparently through MBUSA. The September 12 letter shows that it comes from the company's offices in Palo Alto California and that it designates itself as "A Daimler Company."

subsidiaries, such as MBUSA, and treat the two entities as if they were the equivalent of General Motors Corp. and its unincorporated Chevrolet Division.

Petitioner further argues that the corporate veil between parent and subsidiary cannot be pierced in this case and that, therefore, neither the alter ego nor agency theories permits it to be sued in California. The difficulty with that argument is that piercing the corporate veil is a question of substantive law used to determine whether one company in a parent-subsidiary relationship is substantively liable for the conduct of another, which is not the issue in this Court. Respondents do not seek to hold MBUSA liable for the actions of Daimler or to collect a judgment obtained against Daimler from MBUSA's assets, the classic uses of piercing the corporate veil. Rather, this petition raises the question of whether separate incorporation shields a parent from being sued in a jurisdiction in which its activities are carried out through a subsidiary that it completely controls.

If petitioner's view prevails, non-US corporations can avoid being sued in this country by doing all their business through a wholly-owned subsidiary, an arrangement over which they have total control and over which those whom they injure have no input or even knowledge. To allow such wholesale avoidance of personal jurisdiction would undermine the minimum contacts test as it has evolved since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and result in great unfairness to injured persons and a significant reduction in corporate accountability. By contrast, treating the conduct of wholly-owned subsidiaries as the conduct of the parent will lead to greater predictability and

will avoid the extensive discovery that will inevitably flow from petitioner's understanding of personal jurisdiction that depends on whether the formalities of separate incorporation have been followed in each case by parent and subsidiary.

Petitioner attempts to limit the impact of its position by asserting that this case involves only a claim seeking to use general jurisdiction to benefit non-US plaintiffs involving conduct in a third country, and thus its impact will not cause harm to legitimate US interests. But that view is mistaken in several important respects. Although these respondents are not US citizens, petitioner's theory would result in identical treatment even if plaintiffs were US citizens living in Argentina when the alleged wrongdoing took place. Petitioner's theory would also insulate it from claims by US citizens based on harms caused by defective Mercedes automobiles purchased in Germany, and subsequently brought to California. Indeed, the approach advocated by petitioner would save it from being sued on the basis of specific jurisdiction even for defective automobiles purchased in California and causing personal injuries there.

If petitioner is correct that a court must accept the parent-subsidiary shield for purposes of general jurisdiction involving a non-US parent corporation, there is also no rationale that would preclude it from applying that limitation to claims against US parent corporations abased on general jurisdiction. Indeed, so broad is petitioner's position that it would also enable US corporations to set up similar subsidiaries so that the parent could avoid suit except where it is incorporated, has its principal place of business, or does business under its own name, such as where it has manufacturing facilities, even for claims based

on specific jurisdiction. Even if it is possible to sue the subsidiary for the wrongs of the parent, any such suits will be beset with problems that would not be encountered in an action against the parent, especially where the claim is that the product was defectively designed or manufactured, activities that are in the total control of the parent.

3. Petitioner also asks the Court to find a lack of personal jurisdiction over it because it was unreasonable for the lower court to find personal jurisdiction in this situation. Although this Court has discussed issues of reasonableness in determining personal jurisdiction, there is no case in which the Court has denied jurisdiction on that basis alone. It is time for this Court to reject that additional escape for defendants for three reasons: (a) unreasonableness in this context adds nothing of significance to a finding of minimum contacts; (b) the inquiry is inherently subjective: and (c) as described by petitioner, such a finding is largely if not entirely covered by other doctrines such as transfer, venue, and forum non-conveniens, which are better suited, and less subject to manipulation, than is an attempt to overlay a finding of reasonableness on top of a finding of minimum contacts. That is the lesson of Justice Scalia's opinion in *Burnham v. Superior Court*, 495 U.S. 604 (1990), and it should now be adopted as law in all personal jurisdiction cases.

ARGUMENT

THE DISTRICT COURT HAS GENERAL JURISDICTION OVER PETITIONER.

A. THE CONTINUOUS AND SYSTEMATIC CONTACTS OF PETITIONER'S SUBSIDIARY WITH CALIFORNIA PROVIDED THE PROPER BASIS FOR PERSONAL JURISDICTION OVER PETITIONER IN THIS CASE.

1. The Theory Relied on by Petitioner Would Affect Many Cases Beyond the Unusual Facts of This Case.

Petitioner wishes this Court to treat this case as if the question presented were "Why should a German corporation be permitted to be sued in California, where it does no business, over claims by citizens of Argentina, based on conduct of the corporation's Argentine subsidiary?" But the issue before this Court involves only the Due Process Clause of the Constitution, and does not involve other doctrines, such as forum non-conveniens, that may bear on that question. More importantly, the theory advanced by petitioner to sustain its Due Process challenge would extend far beyond the facts of this case and would enable many corporations to avoid being called to account for their actions by the simple device of establishing a wholly-owned subsidiary to act on its behalf.[3]

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[3] Petitioner relies heavily on *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). As explained at length in respondents' brief, that case is the converse of this one: it held

For example, on the merits, but not as part of the personal jurisdiction inquiry, there is the fact-based legal issue of whether Daimler, as parent, may be held legally responsible for the conduct that caused respondents' injuries, which were allegedly inflicted on them by the direct actions of Daimler's Argentine subsidiary. Whichever court has to decide that question will have to invoke the applicable choice of law principles to decide whether Argentine, German, or California law should apply. But whatever the answer to that question may be, petitioner's theory would preclude any US court from even reaching it.

Beyond these unique claims, three examples illustrate the far more common claims that would escape suit in California under petitioner's theory:

(1) An officer in the US Army, whose home state is California, is stationed in Germany and buys a Mercedes, drives it for two years, and has it shipped to his next duty station in California. A year later, its gas tank explodes, killing two passengers and seriously injuring the serviceman who brought the car from petitioner. Suit is filed in California against petitioner.

(2) The Bank of Southern California opens a branch in Stuttgart where Daimler's

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that a wholly-owned non-US subsidiary could not be sued in North Carolina, based on the activities of its US parent in that State, when the subsidiary itself did not have minimum contacts with that State. None of the rationales advanced for subjecting petitioner to suit here, nor any of the adverse consequences in terms of the ability of a parent to avoid being sued in the US, discussed *infra* at 10-16, apply to that situation.

headquarters are located. It loans Daimler $50 million and several years later, it closes the office. Daimler defaults on the loan, and the Bank files suit in California to collect the amount owed.

(3) After completing graduate studies in engineering in Germany, a California citizen accepts a job working for Daimler in Stuttgart. After five years there, he returns to California, with a promise from Daimler that it would send him a check for $10,000 that is owed to him for work done in Germany under his contract. When the company does not honor its promise, he sues in California to collect his $10,000.

In each of these examples, and many others that could be constructed, the only basis for jurisdiction against Daimler would be general jurisdiction because in none of the transactions did Daimler have specific contact with California. In all three, it was *foreseeable* that Daimler would be sued in California, but after *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) ("*World-Wide VW*"), it is clear that foreseeability alone is not sufficient even to establish specific jurisdiction. Daimler's wholly-owned subsidiary MBUSA does business in California on a "continuous and systematic" basis, *Goodyear*, 131 S. Ct. at 2851, where it sells thousands of automobiles each year that it purchases from Daimler, and it is not disputed that MBUSA is subject to general jurisdiction in California. *See* Resp. Br. 5, 13-14. Nonetheless, under Daimler's theory, it could not be sued in California over any of

those claims or any other claim in which the plaintiff is relying on general jurisdiction.

In its brief supporting petitioner, the United States suggests that "[i]n some instances, the interests of the United States are served by permitting suits against foreign subsidiaries to go forward in domestic courts" (Br. 1). Those might include the cases in which a federal statute is involved (Br. 3) and for which the United States in its amicus brief in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), also suggested that the door be left open. But if petitioner's is right that, if the formalities of separate incorporation of a defendant's U.S. subsidiary are followed, the activities of the subsidiary are not chargeable to the parent for jurisdictional purposes, then the presence of a federal claim would be irrelevant, and there will be "no instances" in which such suits can be brought in domestic courts.[4]

Amicus recognizes that the brief decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), can be read to support petitioner. But that decision pre-dated *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and the beginning

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[4] The position of the Chamber of Commerce is even more extreme than that of petitioner. According to the Chamber, general jurisdiction over a corporation is *only* available where it is incorporated or has its principal place of business (Chamber Br. at 9). Those places are the functional equivalent of the residence of an individual. *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) ("*McIntyre*"). However as *Burnham, supra*, held, an individual is subject to general jurisdiction any place where he is personally served. If the Chamber is right, corporations would be *less* amenable to suits than individuals when the claim is unrelated to the forum jurisdiction, even if the corporation had a plant and thousands of employees in that jurisdiction.

of the modern era of personal jurisdiction by twenty years. Moreover, as shown in the concurring opinion of Justice Shirley Abrahamson in *Rasmussen v. General Motors Corp.*, 335 Wis.2d 1, 803 N.W.2d 623, 639-640 (2011), there is a considerable basis for reading that decision more narrowly, even taking into account when it was written. But if it were good law today, it would provide an iron-clad blueprint that would enable all corporations to avoid being sued based on either specific or general jurisdiction by doing business outside its home state through a 100% owned subsidiary.

Even more significant, petitioner's theory, which makes a separately incorporated wholly-owned subsidiary the touchstone for avoiding general jurisdiction, would also result in a major reduction of the ability of claimants to rely on specific jurisdiction. That can be seen from applying the result in *McIntyre*, a case that petitioner does not cite, presumably because its position is that this case has nothing to do with specific jurisdiction. In *McIntyre* this Court held that a British manufacturer could not be sued in New Jersey because it had sold all of its products to a company that the Court found to be an independent third party distributor that in turn sold the machine that injured the plaintiff to the plaintiff's employer. The distributor in *McIntyre* was not owned in whole or in part by the manufacturer, although its independence was open to real question. 131 S.Ct. at 2797 (Ginsburg, J. dissenting); Alan B. Morrison, *The Impacts of McIntyre on Minimum Contacts*, 89 Geo. Wash. L. Rev. Arguendo 1, 4-5 (2011). By concluding that the distributor was independent, and because of the lack of any other contacts by the manufacturer with New Jersey, the Court ruled that the manufacturer had

not "purposely availed" itself of the laws of New Jersey and hence could not be sued there. Therefore, because the same Due Process Clause is at issue in this case as in *McIntyre*, if petitioner's theory is accepted for general jurisdiction, it would apply equally to specific jurisdiction. That would produce disastrous results for the victims of tortious conduct by parent manufacturers that do business in the United States entirely through their wholly-owned subsidiaries.

To illustrate: suppose in the next case, Daimler sells a Mercedes to MBUSA, as it does with all the Mercedes that it manufactures for sale in the U.S. The car is then sold to a dealer (who is truly independent of both Daimler and MBUSA), who in turn sells it to a California citizen. Several months later, the car's gas tank explodes causing serious injuries to the driver-owner and the death of his two passengers. If Daimler's insulation theory is correct, the victims of that explosion could not sue Daimler because it would not have "purposely availed" itself of the laws of California, even though its wholly-owned subsidiary, to which it sold the car that caused the injuries in question, was doing business in California and was the exclusive agent to sell Daimler products throughout the United States. JA 149-50, 206.

The victims could, of course, obtain specific jurisdiction over MBUSA and the dealer who sold the car in question, but whether they would have legally and factually viable claims against them based on defects in design or manufacture of the vehicle would be determined by the applicable state laws. Without pre-judging the answer, the question would be whether parties that had no role in the design or manufacture of the vehicle, or any ability to

determine whether there were defects or the right to try to fix any that they found, could be held liable under the applicable state law for the injuries that resulted. Even if the law allowed such suits to proceed, a jury might find them not liable, perhaps on the belief that Daimler – the true culprit – had already paid its share or would in a subsequent lawsuit. Moreover, in a suit against MBUSA and the dealer, none of the discovery tools available against parties, such as interrogatories, requests for the production of documents, and requests for admission, could be used against Daimler. All discovery against Daimler would have to rely on treaties between the US and Germany, and any discovery enforcement would take place in German courts, with all the resulting expense, delay, and uncertainty.

It is more than a little ironic that the acceptance of petitioner's theory would turn the outcome in *World-Wide VW* on its head, not to mention exponentially expanding the impact of *McIntyre*. Thus, in *World-Wide VW*, no one disputed that plaintiffs could sue the German manufacturer as well as the US subsidiary that imported the car in question into this country. That was true even though the plaintiffs' injuries occurred in Oklahoma, a thousand miles from where the car in question arrived in the US and from where it was sold to the driver who suffered the injuries caused by its alleged defects. In fact, the Court in *World-Wide VW* unambiguously identified conduct like Daimler's as sufficient grounds to establish jurisdiction: "if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, *but arises from the efforts of a manufacturer or distributor to serve, directly or indirectly*, the market for its product in other States,

it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or others." 444 U.S. at 297 (emphasis added).

But if Daimler is correct in its approach, the plaintiffs could have not sued the manufacturer in *World-Wide VW* in Oklahoma because its sale of the car to the importer would have insulated it from suit there even for defects in design or manufacture of the vehicle. Indeed, under the agreement between MBUSA and petitioner, all sales occur outside the US, where title passes to MBNA. Pet. Br. 4. Thus, even if, as Justice Kennedy suggested in *McIntyre*, 131 S. Ct. at 2790, Congress were to confer federal court jurisdiction over foreign companies that purposely avail themselves of any laws in the United States, the completion of the sale, under petitioner's theory, even to a wholly-owned subsidiary, would close that avenue as well.[5] Moreover, in *World-Wide VW*, there was an apparently independent distributor, like the one in *McIntyre*, that obtained its cars from the importer. 444 U.S. at 288-89. But under *McIntyre*, plus the insulation that would be provided by acceptance of petitioner's theory, the other remaining defendant in *World-Wide VW* – the importer – would also no longer be subject to suit in Oklahoma or any place except where it sold the car in question or where it is subject to general jurisdiction.

Furthermore, there is no basis on which petitioner's theory can be limited to corporations that

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[5] The defendant in *International Shoe* sold its products FOB St Louis, 326 U.S. at 314, but that did not stand as a barrier to personal jurisdiction over it in the State of Washington where the shoes were sent.

are established outside the United States. Although Justices Breyer and Alito in their concurrence in *McIntyre* suggested that the result in that case might not apply if the defendant were a US, as opposed to a foreign person, 131 S. Ct. at 2793-94, Justice Kennedy's plurality opinion does not support such a distinction. Nor does logic or precedent. The Due Process protection against suits in jurisdictions with which the defendant has no contacts focuses its inquiry on the activities of the defendant in the place where the suit was filed, irrespective of the location of the defendant when it undertook the conduct at issue in the lawsuit. To be sure, the outcome in *Asahi Metal Industries Co. v. Superior Court*, 480 U.S. 102 (1987), was doubtless affected by the fact that the only remaining defendant was a Taiwanese corporation that had no connection with California, beyond the fact that one of its parts was a component in a tire that ended up there in a motorcycle that caused the injury in question. There was no opinion for the Court in *Asahi*, but it is hard to see how it would have come out differently if all that remained was a suit between two US, but non-California, component manufacturers, instead of between two non-US companies, as in *Asahi*. Put another way, all of the reasons that Due Process protects a non-US company from being haled into court in a state with which it has no contacts apply fully to a US corporation when it is sued in a state with which it has no contacts.

2. Petitioner's Approach Will Result in Substantial Unfairness to Claimants, Will Not Increase Predictability, and Will Result in Increased Litigation Costs.

Petitioner makes much of the desirability of predictability in this area. Pet Br. 16, 21, 27. But with predictability comes the real potential for large companies to arrange their affairs to insulate themselves from liability by establishing wholly-owned subsidiaries, such as Daimler did with MBUSA. Amicus assumes that Daimler's parent-subsidiary arrangement was done for legitimate reasons, but if the Court accepts petitioner's insulation theory, the ability to avoid lawsuits in most jurisdictions will become a very welcome side-benefit for the company and is likely to cause other companies to make similar arrangements for the very purpose of limiting the states in which they can be sued. Such arrangements will not totally protect a company from suits away from home, but they can significantly limit suits to places in which it has a substantial presence, where it can always be sued.

If petitioner's theory were to become the law, future plaintiffs might be faced with a difficult choice: suing only the defendants with local contacts in the local court, with all the problems applicable to a suit where the "real" defendant – the parent – is not subject to personal jurisdiction, or journeying to where the parent can still be sued, with all the cost and inconvenience that it entails, and with the loss of the right to sue "local" defendants there. What is most unreasonable about these scenarios is that the parent is totally in control of them. Those who may be injured by its wrongdoing never consent to this

arrangement and have no way to counter or avoid their consequences. Nothing in the Due Process Clause compels such unfair results.

Moreover, since petitioner's theory still leaves room for a finding of a "sham" relationship between parent and subsidiary, there would still be an issue in every case as to whether it is appropriate to pierce the corporate veil between parent and wholly-owned subsidiary. That opening has two side effects that undermine petitioner's stated desire for predictability and simplicity. First, a company will never know whether its parent-subsidiary arrangement will be upheld until it has been litigated, perhaps more than once if there are changes in the relationship. That means the certainty that petitioner seeks will not result, unless it also advocates the elimination of all efforts to pierce the corporate veil, including even for plainly sham parent-subsidiary relations. Second, once the door is open to examining that relationship, every case will involve substantial discovery, similar to what took place in the trial court in this case, where the record excerpts on appeal on this jurisdictional issue extended to well over 400 pages. That will mean that time and expense unrelated to the merits will be imposed on both sides, contrary to the goal of Rule 1 of the Federal Rules of Civil Procedure – obtaining a "just, speedy, and inexpensive determination of every action and proceeding."[6]

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[6] The brief of the United States (17-18) suggests that the inquiry should include a determination of how many cars Daimler sells in California through its subsidiary, relative to its sales elsewhere. That approach would not only undermine the predictability that petitioner and the United States claim to desire, but would substantially increase discovery costs and delay and present the court with an essentially unanswerable

By contrast, if for purposes of determining personal jurisdiction, the court treats the activities of all wholly-owned subsidiaries as the activities of the parent, when they involve the same business as that of the parent, that will greatly simplify the process. Thus, there is no doubt that sales of Mercedes-Benz, through MBUSA, are substantial, amounting to 2.4% of its world-wide sales, and if they are taken into account, there should be little question that both MBUSA and Daimler are subject to general jurisdiction in California. Indeed, if the proper test of attributing the activities of a wholly-owned subsidiary to its parents were applied, Daimler would not, consistent with Rule 11, even be able to move to dismiss for want of personal jurisdiction.

Moreover, this approach will increase certainty and the ability of companies to plan: if you create a wholly-owned subsidiary, you should assume that you will be subject to suit in any place where the subsidiary can be sued. It will not, and should not, matter whether the parent exercises day-to-day control over the business of the subsidiary. Daimler does not dispute that, as the sole shareholder, it has the power to compel the subsidiary to do its bidding and to reverse actions of which it does not approve, just the way that a company with divisions, but no subsidiaries, controls the activities of those divisions. And if there were any doubt about Daimler's control over MBUSA regarding the sale and servicing of Mercedes-Benz automobiles in the United States, a look at the

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question of how many sales are enough. The open-ended and extremely flexible approach suggested by the United States (Br. 18-22) would cause similar problems and should be rejected for that reason as well. *See also id.* at 30, n. 10, suggesting complicated tests based on applicable federal and/or state law.

extensive General Distribution Agreement between the two companies will dispel that notion. JA 149-215.

Accordingly, this Court should hold that, because there is general jurisdiction in California over MBUSA, and because MBUSA is a wholly-owned subsidiary of Daimler, the California courts have general jurisdiction over respondents' claims against Daimler. In some cases, the subsidiary may not be subject to general jurisdiction because it is not doing business in a state, even though it sold a car made by the parent to a buyer in that state. A plaintiff alleging a defect in that car would have to rely on specific jurisdiction, and under the 100% ownership attribution rule advanced by amicus, the parent would be subject to specific jurisdiction in that state only if, but always when, the subsidiary is subject to specific jurisdiction over a claim relating to a product of the parent. Such a result would hardly be the kind of "random, fortuitous or attenuated contacts" found objectionable in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). In short, whenever there is 100% ownership of a subsidiary, the contacts of the subsidiary should be attributed to the parent for purposes of determining both general and specific jurisdiction.[7]

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[7] Contrary to the claim of the Chamber (Br. 2, 5, 33) attributing the activities of a corporate subsidiary to its parent would not open the doors to sue a 100% shareholder in a jurisdiction where his corporation was doing business or even headquartered. That is because corporate subsidiaries are created to carry on the business of their parents, whereas a shareholder will generally set up a corporation to do a particular business, but not to be the alter ego for the shareholder's entire life. Surely, the sole owner of the stock of a widget-making corporation chartered in Delaware could not be sued for divorce there if he resided in California and had no

B. THE COURT SHOULD REJECT THE REASONABLENESS OVERLAY THAT PETITIONER ASKS IT TO APPLY.

Even if this Court upholds the ruling below that petitioner has sufficient contacts with California to warrant its being sued there, petitioner nonetheless asks the Court to erect an additional hurdle that would prevent this case from being tried in California: its contention that Due Process also includes a further reasonableness requirement that respondents do not satisfy. That request should be rejected for several reasons.

First, if such a rule now exists, it is a one-way street, helping only defendants avoiding a lawsuit in a place not of their choosing. Notably, petitioner and its amici do not support the other side of that rule: when it is unfair to require a plaintiff to go elsewhere to sue, then suit should be allowed where plaintiff resides. Although petitioner would doubtless suggest that the reasonableness requirement is applicable mainly to cases like this, there is, once again, no basis in the Due Process Clause that can contain it to cases involving non-US corporations whose conduct abroad allegedly harmed non-US citizens. Moreover, as then-Justice Rehnquist observed for the Court in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984), "we have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have

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connection with Delaware other than his ownership of a Delaware company.

upheld the assertion of jurisdiction where such contacts were entirely lacking."

More importantly, if such a rule is embedded in Due Process, it would necessarily apply to all cases in which personal jurisdiction is contested, regardless of whether jurisdiction is alleged to be general or specific, or whether it is based on personal service within the state, the domicile of the individual or corporate defendant, or the amount or nature of the contacts that the defendant has with the forum state. And it surely could not be limited to non-US defendants when general jurisdiction is the basis for suit.

The goal of Due Process in the context of personal jurisdiction is to assure that it is fair to hale the defendant into a court of the forum state to defend against the plaintiff's claim. Since *International Shoe*, this Court has developed a series of more-or-less objective tests that serve as a proxy for a fairness determination, the principal one being that of minimum contacts. For general jurisdiction cases, the tests seek to answer the question of whether the defendant has a "home" in that state, or is doing sufficient business there that the state should be considered a second (or third or fourth) "home" to that company. In order to satisfy minimum contacts for specific jurisdiction, the plaintiff must only establish that there are sufficient contacts with that state with respect to the claim at issue. Those tests do not answer all questions, and at the margins they are surely unclear in some applications, at least until this Court has settled their meaning in particular contexts, as it did in *Goodyear* and *McIntyre*, and as it may do in this case.

To the extent that fairness and reasonableness are seen as a goal and various tests have been applied to determine whether that goal has been met, it is unobjectionable. But as Justice Scalia observed in *Burnham*, once the applicable test has been satisfied – personal service on Mr. Burnham in the forum state – that is the end of the Due Process inquiry. 495 U.S. at 622-23. *See also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773 (1984) (reversing court of appeals which found lack of personal jurisdiction because of factors beyond minimum contacts with forum state that made it "unfair" to sue defendant there).

Amicus recognizes that, in a number of personal jurisdiction opinions of this Court, mainly those by Justice Brennan, there have been discussions of the fairness of allowing the defendant to be sued in that jurisdiction and that those discussions provide some basis for petitioner's secondary plea. *See, e.g., Burger King*, 471 U.S. at 476-77; *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). In none of those cases, with the possible exception of *Asahi*, in which there was no majority opinion and the case came from a state court, was unreasonableness found to be the basis for denying jurisdiction when it was otherwise proper. Given *McIntyre's* rejection of the stream of commerce argument, even for the large, expensive, and dangerous finished product at issue in that case, *Asahi*, with its highly unusual facts, would be quickly dismissed today, thus undermining whatever claim to precedent its reasonableness discussion might have. Moreover, as *Burger King*, 475 U.S. at 477, and *World Wide VW*, 444 U.S. at 302, show, Justice Brennan generally used fairness and

reasonableness as a basis to *uphold* jurisdiction, not as petitioner urges, to deny it.[8]

More important, use of reasonableness in personal jurisdiction claims should be rejected because it is both unprincipled and unnecessary. It is unprincipled because it is entirely subjective and acts as a one-way ratchet by which a defendant can escape suit in a given forum even if the minimum contacts test has been met. Due Process entails a set of legal doctrines that have explained and expanded the concept of minimum contacts in various contexts. They have limits, and the courts are bound to follow their applications in subsequent cases.

Not so for reasonableness, as Justice Scalia's examples in *Burham* demonstrate. The out-of-state defendant was sued in California for divorce by his wife who had moved there. Service was effected personally on him, while he was there visiting his children as part of a three day California trip. If reasonableness were an additional out for Mr. Burnham, Justice Scalia asked, would the outcome have been different if he came there only on business, or if he had no contact with his family while there, or if his visit was only for minutes, or he came to see a sick or dying child? *Burnham*, 495 U.S. at 625-26. One could add, would it have mattered if he were served in an airport while awaiting a change of planes, or if his flight to China was diverted to San Francisco, where a process server caught up with

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[8] Amicus recognizes that reasonableness was a decisive factor in 2-1 decision holding that there was no general jurisdiction over the defendant, because the court considered that, unlike this Court, was bound to follow *Asahi* on that issue. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573 (2d Cir.), *cert. denied*, 519 U.S. 1006 (1996).

him? Or in this case, would the outcome be different if reasonableness was added to minimum contacts, and if the claims arose in Germany, or the plaintiffs were former German citizens who now were permanent resident aliens, or even U.S. citizens, living in California?

Those questions are unanswerable because there is no principled way that the Due Process Clause of the Constitution can be interpreted to provide acceptable answers. That is because such an inquiry is fraught with "subjectivity and hence inadequacy," and there is no guiding principle by which meaningful lines can be drawn. *Burnham*, 495 U.S. at 623. The inquiry is one that is also infinitely manipulable and based on "no authority other than individual Justices' perceptions of fairness." *Id.* at 627. What is left is "a 'totality of the circumstances' test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum's competence." *Id.* at 626.

Equally important, adding reasonableness on top of minimum contacts is unnecessary. Assuming that there are some cases in which Due Process has been satisfied, but in which trying the case in another forum seems to be clearly indicated, there are other procedural rules for accomplishing that end that do not involve constitutionalizing an inherently subjective inquiry such as reasonableness. Indeed, Justice Brennan in *Burger King* specifically noted that even where "some other considerations would render jurisdiction unreasonable [they] usually may be accommodated through means short of finding jurisdiction unconstitutional." 471 U.S. at 477.

In the federal courts, there are at least three established doctrines that address this problem in a much more appropriate way. As noted, petitioner's reasonableness inquiry would apply to all defendants, not just those against non-US corporations. Thus, if the defendant is a US person, the recent revisions to the venue statute, 28 U.S.C. § 1391(b), would provide additional protection even if there is personal jurisdiction. Moreover, the transfer statute, 28 U.S.C. § 1404(a), permits transfers to another district court for "the convenience of parties and witnesses in the interest of justice."[9]

In addition, there is the doctrine of forum non-corveniens, which Justice Brennan specifically mentioned, along with section 1404(a), in *Burger King*. 471 U.S. at 477, n. 20. Both doctrines are obvious candidates for consideration in this case by the district court, which is in the best position to gather evidence regarding the relevant factors as enunciated by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). It is also better able to weigh the discretionary factors at issue than is an appellate court, and it can also impose conditions on granting the motion, such as a willingness to provide certain discovery or not to interpose a statute of limitations defense based on the new filing abroad. Moreover, extensive discovery will rarely be needed on these other determinations, saving time and expense for all, especially as compared to the kind of discovery needed to answer the personal jurisdiction question in this and other similar cases. As discretionary

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[9] *Walden v. Fiore*, No. 12-574, *petition granted*, March 4, 2013, is an excellent example of a case in which a motion to transfer should have been considered at the outset in lieu of the lengthy litigation regarding personal jurisdiction.

rulings, they would not set any precedent, including that the defendant is subject to suit in that forum. In addition, they would provide little or no basis for appeal, regardless of which way the district court decided. And they would be much more efficient in sorting out the appropriate from the inappropriate cases, and thus able to assure that, as the United States urges (Br. 1), there would be "some instances" in which suits against foreign corporations could be brought in domestic courts

Finally, if current federal law does not properly require courts to take into account the relevant factors, that is a matter for Congress to address in legislation, not for courts to impose based on their views on what factors are relevant and how they should be balanced. Indeed, the existence of these alternative avenues for addressing concerns about the reasonableness of entertaining a lawsuit in a given forum, while perhaps falling short of preempting the field, at least should sound a cautionary note before this Court makes the concerns animated by those avenues part of an unalterable constitutional determination, as petitioner argues.

Nor is the possibility that a plaintiff will choose to sue in a state court, when these federal laws do not apply, a reason for the Court to accept petitioner's proposal. If there is a federal claim, the entire case can be removed, regardless of the residence/citizenship of the defendant. 28 U.S.C. § 1441(a). If there is diversity jurisdiction under 28 U.S.C. § 1332, the case can also be removed unless one of the defendants is a citizen of the forum state, 28 U.S.C. § 1441(b)(2). But if the defendant is a citizen of that state, it would never be unreasonable to sue that defendant there. And if the case is a class action under 28 U.S.C. § 1332(d)(1), removal may be

made without regard to the citizenship of any of the defendants. 28 U.S.C. § 1453(b).

The only situation in which removal will not be available (excluding those in which the amount in controversy is not more than $75,000) is the rare case like this one in which alien plaintiffs are suing an alien defendant. But even then, it assumes that state courts, which are overworked and underfunded, do not now have in place rules that keep such cases out of their courts, at least when the plaintiffs are not residents of the state. As applied to this case, California has a statute that performs the same function as does the federal doctrine of forum non conveniens. Under Section 410.30(a) of the California Code of Civil Procedure, if a court "finds that in the interest of substantial justice an action should be heard in a forum outside this state," it "shall stay or dismiss the action in whole or in part on any conditions that may be just."

Moreover, it is not just California that has the authority to dismiss cases brought in an inappropriate forum. As of 2008, 47 states have confirmed their ability to dismiss cases that should more properly be heard elsewhere through the application of the forum non conveniens doctrine. *See Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1180 n.9 (R.I. 2008). And none of the remaining three have definitively rejected it. *Id. See also* Restatement (Second) Conflicts of Law § 84 (1971) and the many cases that have cited it: "**Forum Non Conveniens**: A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff."

As expressed by the Mississippi Supreme Court, there is a very sensible, non-defendant-biased reason why states have embraced the doctrine: allowing suits by non-residents against non-resident defendants "would waste finite judicial resources on claims that have nothing to do with the state. Each trial requires the empaneling of Mississippians as jurors and the use of Mississippi tax dollars. These resources should be used for cases in which Mississippi has an interest." *3M Co. v. Johnson*, 926 So.2d 860, 866 (Miss. 2006).

Whatever practices might have existed in prior years when state courts did not have limits on their venue rules and were wide-open to cases like this, that is no longer true. For this reason, there is no realistic fear that imposing a reasonableness requirement as an additional part of the Due Process analysis is needed to protect defendants from being sued in inconvenient state courts.

It is, of course, possible that some case, somewhere, involving facts more extreme than this, will not be sent elsewhere. That may be because Congress, state legislatures, and/or state supreme courts will either have different judgments about whether those cases should be heard in existing fora, or they have not made what the defendant considers to be desirable amendments to the laws on forum selection. But the minimal likelihood that such cases will arise at all, or with sufficient frequency to cause serious problems, is not a reason for this Court to make a constitutional issue out of reasonableness in every personal jurisdiction case, as petitioner would have it do.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed, and the District Court directed to consider whether any federal claims remain in the case, and, if not, to exercise its discretion under 28 U.S.C. § 1367(c) to keep or dismiss the non-federal claims.

Respectfully Submitted,

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August 26, 2013

ADDENDUM

Letter from Rosario Beretta, Mercedes-Benz Research & Development North America, Inc., to California Energy Commission (Sept. 17, 2012) . . .2a

Mercedes-Benz

California Energy Commission
DOCKETED
12-HYD-01

TN # 67179
SEP 17 2012

Mercedes-Benz
Research & Development
North America, Inc.

Group Research & Advanced
Engineering USA Division
A Daimler Company

September 17, 2012

California Energy Commission
Dockets Office, MS-4
Docket No: 12-HYD-1 Hydrogen and Transportation
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: Submittal by Mercedes-Benz Research & Development North America, Inc. – Input for docket number **12-HYD-1,** Hydrogen and Transportation-DRAFT Solicitation Comment

To Whom It May Concern:

Since 2005, Mercedes-Benz Research & Development North America has leased fuel cell vehicles in the State of California and presently leases over forty B-Class F-Cell vehicles to private individuals in Southern California. Through our vehicle operation, we have collected a multitude of knowledge and data on customer behavior related to vehicle operation and hydrogen refueling.

Therefore, we suggest a few minor modifications to the Hydrogen and Transportation-DRAFT

Solicitation based on our experience and market research. These suggestions also acknowledge the voice and feedback of our F-Cell customers and ensure the utmost level of success of this solicitation and future vehicle operation within California.

We are pleased that the Energy Commission chose to heed the advice of the CaFCP OEM Working Group and have incorporated the aggregated OEM hydrogen station priority locations directly into the draft solicitation using the maps produced by UC Irvine. Locating stations in the identified areas supports the execution of our early commercialization plans.

Our suggestion concerns station performance. The performance criteria language in the draft solicitation needs to set specifications that are able to kick-start the commercialization of hydrogen fuel cell vehicles. The stations must provide H70 Type A fueling performance as defined in SAE TIR J2601. This allows comparable fill times to conventional passenger cars which our customers expect and for stations to easily meet the hourly peak station demand in prime areas.

In addition, the performance requirements for stations in prime areas should be much higher than the minimum values given in the draft solicitation in order to meet the initial customer demand. Specifically, these stations must be able to fuel at least 10 cars per hour during peak times (50 to 70 kg/hour) and provide at least 150 kg over a 12 hour period. Stations not meeting these performance targets will not meet customer expectations and may struggle in the market jeopardizing the success of hydrogen technology.

[page 2]

Therefore, we also suggest that the Qualifications of the Weight for Solicitation Section XII-9 be increased from 2 to 7 in order to show the proper level of importance for station performance in the solicitation. The current draft solicitation weight of 2 greatly undervalues station performance, and ensures high customer frustration with the station and likely low customer utilization.

Thank you for your consideration and support. If there are any questions or need for any additional information, please contact me by phone (310-549-9646) or by e-mail (rosario.berretta@daimler.com)

Sincerely,

/s/ Rosario Berretta
Rosario Berretta
Mercedes-Benz Research & Development
North America, Inc.
Fuel Cell Vehicle Operations

Mercedes-Benz – are registered trademarks of Daimler AG, Stuttgart, Germany

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AMICUS CURIAE BRIEF

No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation (the "Foundation" or "Atlantic Legal") is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to scientists, educators, parents, and other individuals and trade associations. Among other things, Atlantic Legal's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound policy.

Atlantic Legal's leadership includes distinguished legal scholars and practitioners from across the legal community, including members of national and international law firms and general counsel or retired general counsel of major multinational and smaller companies. The Foundation's leadership collectively has decades of experience in the practice of corporate and

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[1] Pursuant to Rule 37.2(a), *amicus* states that all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

commercial law, including securities law. The Foundation has served as *amicus curiae* or counsel for *amicus curiae* in a variety of cases involving the constitutional implications of corporate civil and criminal liability, as well as the interplay between U.S. and international law.

The Atlantic Legal Foundation consequently understands that the delicate web of international business relations depends in large measure on the respect that nation states show each other.[2] When United States courts assert jurisdiction over foreign corporations, they risk interfering with the

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[2] *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) in which Atlantic Legal represented 28 distinguished former public servants – including then ex-President Gerald R. Ford and former Secretaries of State, Defense, Treasury, and Commerce, senior members of Congress responsible for United States foreign policy and trade policy, former National Security Advisors, Presidential chiefs of staff, and U. S. Trade Representatives as *amici* supporting respondent in case involving the foreign affairs power of the federal government; *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003) in which the Foundation filed an *amicus* brief supporting respondent-appellant in a successful appeal of district court's grant of habeas corpus petition of alien convicted felon, involving issues of customary international law; and, most recently, *Bond v. United States*, No. 12-158 (2013), in which the Foundation filed an *amicus* brief in support of a petition for certiorari in a case concerning the interplay between the treaty power and federal legislative power.

sovereignty of another country, and in doing so reject an international consensus, and the United States may be considered by its trading partners and diplomatic allies to be an unreliable international partner.

In this case, Atlantic Legal is concerned that the Ninth Circuit's vague "agency" test could impose vicarious general jurisdiction on any foreign parent company based solely on the fact that it has a subsidiary that conducts business in a forum State. This expansive assertion of general jurisdiction offends due process because it ignores the fundamental principles of separate corporate identity and limited liability, which have been relied upon by foreign corporations doing business in the United States and U.S. companies doing business abroad.

PRELIMINARY STATEMENT[3]

Plaintiffs (respondents here) are 22 Argentine residents who allege that they, or their relatives, were subject to human-rights abuses while they were employed in Argentina by Mercedes-Benz Argentina, a subsidiary of Daimler AG (hereafter "Daimler") and that Mercedes-Benz Argentina "collaborated with the Argentine government to kidnap, detain, torture, or kill [plaintiffs] or their

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[3] *Amicus* adopts the Statement of Petitioner.

relatives during Argentina "Dirty War" from 1976 to 1983. Pet. App. 2a-3a, 81a.

Respondents filed suit against Daimler in the Northern District of California under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 note. They also asserted claims under the laws of California and Argentina.

Respondents concede that Daimler and Mercedes-Benz USA LLC ("MBUSA"), a Delaware corporation, and an *indirect* subsidiary of Daimler, are separate corporate identities, and Respondents "do not seek to demonstrate that MBUSA is an alter ego" of Daimler. Pet. App. 114a. Instead, Respondents assert that Daimler is subject to general personal jurisdiction in California because MBUSA was acting as Daimler's "agent" in California. Pet. App. 113a.[4]

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[4] Daimler is a German public stock company. It manufactures Mercedes-Benz vehicles in Germany. It does not manufacture or sell products, employ personnel or own property in the United States. Pet. App. 95a. MBUSA distributes Mercedes-Benz vehicles to dealerships in California and elsewhere in the United States. Pet. App. 7a-8a. MBUSA takes title to the vehicles in Germany and distributes them in California and other states pursuant to general policies established by Daimler. *See Bauman* v. *DaimlerChrysler Corp.*, 579 F.3d 1088, 1092 (9th Cir. 2009) (withdrawn opinion). The General Distributor Agreement

(continued...)

After Respondents conducted "jurisdictional discovery . . . on whether an agency relationship exists between [Daimler] and MBUSA and the ability of [respondents] to pursue their claims in Germany . . . or Argentina," the district court dismissed the complaint for lack of personal jurisdiction. Pet. App. 93a, 132a-33a. The district court concluded that MBUSA was not an "agent" of Daimler for purposes of personal jurisdiction because MBUSA's services were not "sufficiently important" to Daimler that "but for the existence of the subsidiary, [Daimler] would have to undertake itself." Pet. App. 84a. The district court also found that the exercise of personal jurisdiction over Daimler would be constitutionally "unreasonable" because, *inter alia*, "both Argentina and Germany provide plaintiffs with an adequate alternative forum for their claims." Pet. App. 85a.

The Ninth Circuit initially affirmed the district court in a 2-1 decision, with Judge Reinhardt dissenting. *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1098 (9th Cir. 2009). The Ninth Circuit held that MBUSA was not Daimler's "agent" because respondents had "failed to make a prima

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[4](...continued)
between Daimler and MBUSA expressly disavows any agency relationship. Pet. App. 8a-15a.

facie showing that [Daimler] would undertake to perform substantially similar services in the absence of MBUSA" and because Daimler did not exercise "pervasive and continual control" over MBUSA. *Id.* at 1096.

The Ninth Circuit granted Respondents' petition for rehearing and vacated its opinion, Pet. App. 146a, and, without further oral argument, issued a new opinion. *Bauman v. DamlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (hereafter "*Bauman*").

The new opinion, written by Judge Reinhardt, held that Daimler in fact was subject to general personal jurisdiction in California because:

> Under the controlling law, if one of two *separate* tests is satisfied, we may find the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum. The first test, not directly at issue here, is the "alter ego" test. It is predicated upon a showing of parental *control* over the subsidiary.[5]

Bauman, 644 F.3d at 920.

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[5] Respondents had not alleged that MBUSA and Daimler were alter egos.

> The second test, which is applicable here, is the "agency" test. That test is predicated upon a showing of the *special importance* of the services performed by the subsidiary:
>
> The agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have *a representative* to perform them, the corporation's own officials would undertake to perform substantially similar services.

Id. (Emphasis in original; citations and internal quotation marks omitted).

The Ninth Circuit panel used a special definition of "agency," applicable only to determining jurisdiction. *Bauman*, 644 F.3d at 923. The first prong of the "agency" test is whether "the services provided by MBUSA are sufficiently important to [Daimler] that, if MBUSA went out of business, [Daimler] would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative." *Id.* at 920. The panel concluded that this element of the agency test was met because the "services that MBUSA currently performs are sufficiently important to

[Daimler] that they would almost certainly be performed by other means if MBUSA did not exist." *Id.* at 922.

The second prong of the agency test articulated by the Ninth Circuit was whether Daimler had the "right to control" MBUSA's operations. 644 F.3d 922-24. The panel stated that "actual control was not necessary,"while acknowledging that there were "cases that might be read to require a more stringent showing of control." *Id.* at 920 n. 12 and 923. Relying primarily on a distribution agreement that gives Daimler contractual rights against MBUSA, the panel concluded that Daimler "had the right to substantially control MBUSA's activities," *id.* at 924, even though the distribution agreement provides that MBUSA controls its own operations.

The Ninth Circuit panel thus concluded that exercising general personal jurisdiction over Daimler was reasonable. 644 F.3d 924.

The Ninth Circuit then determined that neither Argentina nor Germany was an "adequate forum," accepting Respondents' contentions that their claims would be time-barred in those jurisdictions (644 F.3d at 928-29) and the Ninth Circuit's "substantial doubt as to the adequacy of Argentina as an alternative forum." 644 F.3d at 930. Moreover, in the view of the Ninth Circuit panel, "American federal courts, be they in California or

any other state, have a strong interest in adjudicating and redressing international human rights abuses." *Id.* at 927. The Circuit Court concluded that it "comports with fair play and substantial justice" for a federal court in California to adjudicate a dispute between foreign plaintiffs and a foreign defendant based on alleged conduct abroad by a foreign subsidiary of the defendant's corporate predecessor. *Id.* at 929-30.[6]

Daimler petitioned for rehearing and rehearing en banc. The Ninth Circuit denied the petition, over a dissent by Judge O'Scannlain and seven other judges. *Bauman v. DaimlerChrysler*, 676 F.3d 774 (9th Cir. 2011), despite this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011) (hereafter "*Goodyear*").[7]

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[6] The panel acknowledged that "German courts have expressed some concern that this suit may impinge upon German sovereignty," but stated that "we do not agree" with those concerns. *Bauman*, 644 F.3d at 926.

[7] Judge O'Scannlain, citing *Goodyear* as "directly applicable here," (676 F.3d at 776 n.1) (O'Scannlain dissenting) criticized the Ninth Circuit for being "at odds again with the dictates of the Supreme Court". . . perpetuat[ing] a split with at least six of [its] sister circuits," 676 F.3d at 775, and for "reject[ing] respect for corporate separateness, a well-established 'principle of corporate law deeply ingrained in our economic and legal

(continued...)

SUMMARY OF ARGUMENT

The Ninth Circuit held that a foreign company is subject to general personal jurisdiction in California – and can therefore be sued in that State by foreign plaintiffs for alleged human rights violations in a foreign country by a foreign corporate subsidiary allegedly acting to assist a foreign government – notwithstanding that the foreign defendant has no facilities or personnel in the United States. The Ninth Circuit held that there is general jurisdiction over Daimler because MBUSA, a U.S. corporation that distributes Daimler vehicles in California, and a different indirect subsidiary than the one accused of human rights violations, is an "agent" of Daimler.

The Ninth Circuit's application of its concept of "agent" to expand the reach of general personal jurisdiction are in direct and substantial conflict with this Court's precedents and with logic. The

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[7](...continued)
systems.'" *Id.* at 777 (quoting *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)). Judge O'Scannlain also expressed concern that the Ninth Circuit's decision could "have unpredictable effects on foreign policy and international comity," and induce foreign countries to "enact[] retaliatory jurisdictional laws" to reach American corporations with foreign subsidiaries. *Id.* at 779 (internal quotation marks omitted). The court's holding, Judge O'Scannlain wrote, "is an affront to due process." *Id.* at 775.

Ninth Circuit's assertion of expansive general jurisdiction has profoundly disruptive consequences for international and interstate commerce.

The "Due Process Clause . . . limit[s] the power of a State to assert *in personam* jurisdiction over a nonresident defendant." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984). "Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* at 414 (alteration in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

When the requisite "minimum contacts" exist, the exercise of personal jurisdiction over the defendant must also be "reasonable[ ]" in light of factors such as "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985).

"[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the

defendant." *Helicopteros*, 466 U.S. at 414 n.8. When a cause of action does not arise out of a defendant's contacts with the forum State, a court may exercise "general jurisdiction" over a corporation if "the continuous corporate operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Goodyear*, 131 S.Ct. 2846, 2853 (2011) (internal quotation marks and alterations omitted). If the defendant is a corporation, it is appropriate that a State in which the corporation can be fairly regarded as "at home," such as its "domicile, place of incorporation, and principal place of business" exercise general personal jurisdiction. *Id.* at 2853-54.[8]

The Ninth Circuit's analysis and holding are fatally flawed. The Ninth Circuit panel ignored the consistent teaching of this Court on the extent of contacts that warrant assertion of general jurisdiction, ignored well-established principles of corporate separateness, and was oblivious to the realities of commercial relations. Further, the Ninth Circuit's notion of general jurisdiction

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[8] In the absence of a relevant federal statute governing personal jurisdiction, a federal district court looks to whether the defendant is subject to personal jurisdiction in the State in which the court is located. Fed. R. Civ. P. 4(k)(1)(A).

thwarts the settled expectations of foreign (both international and out of state) companies that serve markets in the United States through heretofore well-settled distributorship arrangements, ignores settled law of agency and employs an idiosyncratic notion of "agent," and invokes an "interest" of United States courts in remedying human rights violations universally, in opposition to this Court's recent teaching on the limits of federal jurisdiction in this area.

ARGUMENT

I.

THE NINTH CIRCUIT'S "AGENCY" TEST IS INCONSISTENT WITH DUE PROCESS.

The right to Due Process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-472 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). A court may subject a person to jurisdiction only when that person has sufficient contacts with the sovereign "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316. The requirement of minimum contacts ensures

that the defendant has "fair warning" that its decision to engage in certain activities may subject it to a foreign court's jurisdiction. *Burger King*, 471 U.S. at 472. Consequently, a court's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958). "[I]t is the defendant's purposeful availment that makes jurisdiction consistent with 'traditional notions of "fair play and substantial justice."' *J. McIntyre Mach. Ltd. v. Nicastro*, 131 S.Ct. 2780, 2783 (2011).

Unlike "general jurisdiction." "specific jurisdiction" is the exercise of "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). "Specific jurisdiction," which gives a State authority to adjudicate disputes that "arise out of or are connected with the activities within the state." *Int'l Shoe*, 376 U.S. at 319. Here it is undisputed that there is no basis for the assertion of specific jurisdiction over Daimler because plaintiffs' claims

do not arise out of or relate to any Daimler activities in, or contacts with, California.[9]

In *Goodyear* this Court explained that a court has general jurisdiction over a defendant when its affiliations with the State are so "continuous and systematic as to render them essentially at home in the forum State." *Goodyear*, 131 S.Ct. at 2851. For a corporation, it is a place equivalent to a person's domicile, such as its "place of incorporation, and principal place of business." *Id.*, at 2854. This Court reiterated that a corporation's " continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *Id.* at 2849 (quoting *Int'l Shoe*, 326 U.S. at 318 (1945)).

If a State has "general jurisdiction," its courts have the power to resolve both matters that originate within the State and those based on activities and events elsewhere. *Helicopteros*, 466 U. S. at 414, and n.9. But "those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its

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[9] There is no claim in this case that the criteria for exercising specific jurisdiction, *i.e.*, that the causes of action arise from the parent company's acts within California or from the sale or use of the parent company's products in California. *Bauman*, 644 F.3d at 919.

courts as a general matter." *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. at 2787.

The standard for establishing *general* jurisdiction is more exacting than that applied to specific jurisdiction for good reason: unlike specific jurisdiction, general jurisdiction allows *any* claim to be asserted against a defendant, even if that claim is, as here, completely unrelated to the defendant's contacts with the forum. *Goodyear*, 131 S.Ct. at 2851. The distinction between general and specific jurisdiction was central to this Court's opinion in *Goodyear*, which unanimously reversed a State court's finding of general jurisdiction over Turkey, France, and Luxembourg corporations which had no presence of their own in the United States.

The Ninth Circuit articulated two bases for exercising general jurisdiction over a foreign parent company due to its relationship to a subsidiary: the "alter ego" test and the "agency" tests. *Bauman*, 644 F.3d at 920. The "alter ego" test has two elements: (1) the unity of interest and ownership between the company and its subsidiary make the two essentially the same entity, and (2) failing to disregard the separate identities would lead to fraud or injustice. *Id.*[10] As noted *supra*,

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[10] The "alter ego" test is limited to those situations (continued...)

Respondents disavowed any "alter ego" theory of jurisdiction, and the Ninth Circuit did not apply that test. *Id.*

A. The Ninth Circuit's Agency Test Is Fundamentally Flawed and Is Contrary to This Court's Precedents.

The Ninth Circuit's "agency test" has two elements: (1) the services provided by the subsidiary are "sufficiently important" that, if the subsidiary went out of business, the foreign parent company would continue the operation either by selling the product itself or through a new

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[10](...continued)
in which the court finds such a close connection between a company and its subsidiary that they are essentially the same entity and thus treating them differently for jurisdictional purposes would lead to fraud or injustice. *See Bauman*, 644 F.3d at 929 and cases cited. The alter ego test satisfies due process requirements because the two corporations (or the corporation and an individual) are the same entity. The primary purpose of the "alter ego" test is to prevent fraudulent evasions of jurisdiction, and States should be able to exercise general jurisdiction over any corporation "essentially at home in the forum State" regardless of the corporation's attempt to conceal its activities in the forum State. *See Goodyear*, 131 S.Ct. at 2851.

representative[11] and (2) the parent company has a "right to control" the subsidiary, whether or not it actually exercises the right. *Bauman*, 644 F.3d at 920.

When both of these elements are fulfilled, the Ninth Circuit then considers if the assertion of jurisdiction is fair and reasonable, weighing factors such as the extent of the defendant company's purposeful activity in the forum State, the burden on the defendant, the extent of conflict with sovereignty of the defendant's state, and the forum's interest in adjudicating the dispute. *Bauman*, 644 F.3d at 924-25.

The panel concluded that MBUSA qualifies as Daimler's agent because MBUSA performed activities of "special importance" to Daimler and Daimler had the right to control some aspects of those activities. *Id.* at 924. In reaching that conclusion, the panel ignored established agency law and undisputed evidence in the record refuting the existence of an agency relationship.

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[11] The Ninth Circuit adopted this criterion directly from *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000).

B. The "Special Importance" Criterion Is Virtually Meaningless Because It Does Not Show that the Corporation Is "Essentially at Home in the Forum State."

The "special importance" prong is virtually meaningless. The commercial reality is that most manufacturers want to sell their products in any market in which it is lawful and profitable to do so.[12] In most markets, both inside and outside the manufacturer's home country or State, a manufacturing company will most often use a distributor to sell its products.

The "special importance" element is too sweeping; there is no principled reason why virtually all arrangements between businesses would not, under the Ninth Circuit's test, confer general jurisdiction because almost all businesses would find a different way to conduct business in a particular geographic market if the party with whom they originally contracted as the distributor ceased operating. If the distributor ceased to exist, the manufacturer would undoubtedly seek another

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[12] Of course, a manufacturer is likely to have a stronger desire to sell in a large market than in one where sales will be negligible, but why the size of the market in a forum should confer greater jurisdiction on the courts of that State is not explained by the Ninth Circuit.

distributor to sell its products, or, less likely, attempt to do so itself.

The tautological "special importance" rationale formed the core of the Ninth Circuit's analysis of the issue: Because Daimler wants to sell vehicles in California, any means of distribution that helps it do so is of "special importance" and therefore the forum contacts of any entity that serves as a channel of distribution will be deemed Daimler's contacts with the forum under Ninth Circuit's the "agency" jurisdiction theory.

The "special importance" element is tantamount to a "corporate stream of commerce" test, and is not really distinguishable from the stream of commerce theory used in specific jurisdiction cases. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).[13] Whereas *World-Wide Volkswagen* holds that a State can exert specific jurisdiction up the stream of commerce from a consumer purchase to the maker of the product, the Ninth Circuit's "special

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[13] For purposes of determining specific jurisdiction, the "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" for claims that arise directly from the sale of those products in the forum State. *World-Wide Volkswagen*, 444 U.S. at 297-98.

importance" justification would allow a State to exert general jurisdiction over *any and all* claims up the corporate stream of commerce from a service provider to the corporation for which it provides the service.

But this logic runs head-on into this Court's language in *Goodyear*:

> The distribution of petitioners' tires in North Carolina, respondents maintained, demonstrated petitioners' own 'calculated and deliberate efforts to take advantage of the North Carolina market.' As already explained, *even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.*

Goodyear, 131 S.Ct at 2857 n.6 (internal citations omitted, emphasis added).

In *Goodyear*, this Court unanimously determined there was no general personal jurisdiction over Goodyear subsidiaries which manufactured, distributed, and sold tires in Europe and Turkey, in a case involving a tire that failed in France and caused the death of two American passengers, finding that there was no jurisdiction even though the plaintiffs had a connection with the forum State. *Id.* at 2857 n.5. In *Goodyear*, this Court held that the state court

erred by invoking "stream-of-commerce" concepts developed in the *specific* jurisdiction context to support *general* jurisdiction over the foreign manufacturers.131 S.Ct. at 2851. In the case at bar, unlike in *Goodyear*, not even the plaintiffs have a connection with the forum State or with any State.

The appropriate standard for general jurisdiction is not whether a company has ties of "special importance" within a State, but whether the corporation is "essentially at home" within the State, which the broad Ninth Circuit's test fails even to approximate. *See id.* The "special importance" element of the Ninth Circuit's agency test draws its support primarily from cases dealing with specific jurisdiction, essentially making it a restricted corporate stream of commerce analysis, which this Court has rejected as a basis for general jurisdiction. *See World-Wide Volkswagen*, 444 U.S. at 297-98.

In fact, the Ninth Circuit's "special importance" element appears to be nothing more than a market-size test: Because California (or Texas, New York, Illinois, Michigan (pick any State) is a large market, the foreign company will want to participate in it, and when it does so, it subjects itself to general jurisdiction in that State. But where to draw the line? Is Virginia a large enough

market? Is Maryland? Is Rhode Island? Is Alaska?

The Ninth Circuit's decision does not define how direct the connection be between the foreign corporation and the activities in the forum State must be. Assume individuals living in California bought Mercedes cars at dealerships in Arizona that in turn bought them from MBUSA, and assume further that there were no Mercedes dealers in California (because Daimler does not want to subject itself to California jurisdiction), but Daimler supplies replacement parts and accessories to independent repair shops and auto parts stores in California. Assume further that MBUSA did not have its own sales or repair facilities in California, but at a facility in Texas MBUSA trained mechanics employed by independent shops in several Western States to install replacement parts and repair Mercedes vehicles so as to ensure that the repaired cars were safe, that MBUSA used training materials supplied by Daimler for this purpose, and that the MBUSA-trained mechanics became entitled to display an "authorised Mercedes mechanic" sign in the window of the repair shop, but that they would lose that privilege if they did not take refresher courses periodically; would that not be a right to "exercise control?" Under the Ninth Circuit's test would that not be a sufficient basis for asserting general jurisdiction? Surely, we submit, such

activities should not permit California courts to exercise general jurisdiction over Daimler.

The Ninth Circuit's test seems to be "If the foreign company benefits 'significantly' from the activities of a separate person in the State, the activities of that other person will be deemed those of the in-state actor." As Judge O'Scannlain, dissenting from the denial of rehearing en banc, acutely observed, "[a]nything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774, 777 (9th Cir. 2011) (O'Scannlain, J., dissenting).

Such a criterion is far too broad to satisfy Due Process requirements.

C. Implied Agency Is Not a Proper Basis for General Jurisdiction Over a Foreign Manufacturer Based Solely on Contacts of a U.S. Distributor.

The type of relationship between the foreign manufacturer, such as Daimler, and the domestic distributor, such as MBUSA, is not uncommon. There is no dispute that they are separate corporate entities. Nor is there any suggestion of any illegal or fraudulent misuse of their corporate

structures. Yet, the Ninth Circuit decision holds that Argentinean plaintiffs may sue a German corporation in California for harm allegedly sustained in South America based on a theory of agency.

Indeed, with many other kinds of manufactured goods, especially consumer products, it is common for foreign manufacturers to establish local subsidiaries, retain independent distributors, or sell through established and recognized domestic wholesale or retail resellers, rather than to engage in the domestic distribution business themselves. These kinds of relationships serve legitimate, important and beneficial purposes. For example, Daimler is a designer and manufacturer of motor vehicles and MBUSA is a distributor of vehicles in the United States. Distribution in numerous and diverse markets requires knowledge of the local markets and consumer preferences, local laws and regulations, logistics on the ground, and myriad other aspects of doing business; it requires personnel familiar with local culture and conditions, personnel with different training, experience and skills than those expert in design and manufacturing.

A responsible manufacturer must also seek to maintain the reputation of its products and to ensure that the actions of a distributor of its products, whatever its corporate relationship with

the manufacturer, do not jeopardize the manufacturer's brand, and that the distributor comply with local laws (*see, e.g.* "General Distributor Agreement" between Daimler and MBUSA, §13.6 (J.A. 181a, *et seq.*) and be financially sound (*see, e.g.* "General Distributor Agreement" between Daimler and MBUSA, Art. 12 (J.A. 186a)) . The terms of the Daimler-MBUSA Distribution Agreement are consistent with those interests. The Daimler-MBUSA distribution agreement, upon which the panel opinion so heavily relies as evidence of "control," are typical and does not evidence an especially close relationship between Daimler and MBUSA.

D. The "Right to Control" Test Exceeds the Limits of Due Process.

The Ninth Circuit added a "right to control" element to its "agency" test: "the principal need not *exercise* control at all in order to preserve an agency relationship; the relevant inquiry, rather, is whether the principal has the *right* to control." *Bauman*, 644 F.3d at 923 (emphasis in original).

While this "right to control" element of the agency test limits the breadth of the "special importance" element applied alone, it does not comport with Due Process requirements because this element focuses on an inchoate *right* to control rather than *actual* control. The "right to control" element of the "agency" test is overbroad because

a State may only exercise general jurisdiction over a corporation when it may "fairly be regarded as at home" – such as the corporation's place of incorporation or principal place of business – and *not* merely where the corporation has the *right* to be at home. *See Goodyear*, 131 S.Ct. at 2853-54.

As a matter of logic, a corporation's activity within a State is not "continuous and systematic" merely because it has the *right* to engage in "continuous and systematic" activity in that State if it chooses not to exercise that right. *See id.* at 2851.

We respectfully submit that more than an inchoate "right to control" is needed. A court must engage in careful fact-finding as to the actual activities of the foreign parent in the forum State before asserting general jurisdiction.[14]

The Ninth Circuit's concept of "agency" is *sui generis* and in conflict with principles of agency law. The two distinctive elements of a true agency relationship are that the agent acts on behalf of

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[14] Exercising jurisdiction merely because a foreign corporate defendant has an ownership interest in an affiliate in the forum State when the cause of action does not arise from any actions by the defendant or its forum State affiliate "stretches the boundaries of jurisdictional theory beyond any discernable limit." *See* Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023, 1092-93 (2004)).

the principal and the agent has the power to bind the principal. *See Commissioner v. Bollinger*, 485 U.S. 340, 346-47 (1988) (in determining whether an entity is the "true corporate agent . . . of [an] owner-principal," the Court looks to whether the entity "binds the principal by its actions") (internal quotation marks omitted).[15] The "General Distributor Agreement" between Daimler and MBUSA provides that MBUSA has "no authority to make binding obligations for or act on behalf of DAIMLERCHRYSLER," J.A. at 179a, Art. 11.1(2). *See also*, Art. 11.1(1) which states that MBUSA is an "independent contractor[]" that "shall buy and sell Contract Goods . . . as an independent business for [its] own account" and that the agreement does not make MBUSA "a general or special agent, partner, joint venturer, or employee" of Daimler and does not create any fiduciary relationship. *Id.*

The implication of the Ninth Circuit's reasoning is that every distributor, and indeed every independent contractor, satisfies the Ninth Circuit's agency test so long as the manufacturer has a contractual right to take steps to ensure that

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[15] *See* Restatement (Second) of Agency § 1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.").

its distributor acts to promote the products and that the manufacturer can protect the integrity of its products and its reputation.

E. The Ninth Circuit's Decision Impermissibly Disregards the Distinction Between Separate Corporate Entities and the Due Process Requirement that Minimum Contacts with the Forum State Must Be Assessed for Each Defendant Individually.

This Court has made clear that the relevant jurisdictional contacts are to be assessed for the defendant individually. *See, e.g., Burger King*, 471 U.S. at 475 ("Jurisdiction is proper...where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum" (citation omitted, emphasis in original); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) ("Each defendant's contacts with the forum State must be assessed individually.").

That test is not satisfied in this case. Daimler did not carry on "continuous and systematic" activities in California. It is irrelevant to the whether there is general jurisdiction over Daimler that MBUSA, an indirect subsidiary of Daimler, may be "present" and engage in business in California because "unilateral activity of another party or a third person is not an appropriate

consideration when determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction." *Helicopteros*, 466 U.S. at 417.

In contrast to the Ninth Circuit's rationale for finding general jurisdiction, this Court's test for general jurisdiction focuses on two factors: the purposeful actions of the defendant itself in the forum State and the nature of the defendant's contacts with the forum State, both of which the Ninth Circuit disregards. The Ninth Circuit's finding of general jurisdiction over Daimler because of contacts which its indirect subsidiary MBUSA has with California is based on that court's erroneous finding that MBUSA is an agent of Daimler for all purposes.

The Ninth Circuit's holding, which fails to employ a stringent minimum contacts test, violates this Court's teaching that the requisite minimum contacts "must be met as to *each defendant* over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (emphasis added); *see also Keeton*, 465 U.S. at 791 n.13 ("Each defendant's contacts with the forum State must be assessed *individually*.") (emphasis added).

The Ninth Circuit's test violates this Court's recognition that "respect for corporate distinctions" is a fundamental principle "deeply engrained in

our economic and legal systems." *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998) (citations omitted). A corporation generally will not be liable for the acts of its subsidiaries or other affiliated corporations. *Id.*; *see also*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) (It is "a basic tenet of American corporate law . . . that the corporation and its shareholders are distinct entities."); *Janus Capital Group, Inc. v. First Derivative Traders*,131 S.Ct. 2296, 2304 (2011) (investment advisor not liable for statement made by its mutual fund client, even though there was a close corporate relationship between the advisor and the mutual fund: "We decline this invitation to disregard the corporate form"). The panel's reasoning is also contrary to *Consol. Textile Corp. v. Gregory*, 289 U.S. 85 (1933), which held that sales through a subsidiary in the forum do not render the parent "present" in that forum, even though the subsidiary was "wholly controlled by" as well as "an agent of" the parent. *Id.* at 88.

The Ninth Circuit's decision, which found general jurisdiction based on the actions in and contacts with the forum of an entity other than the defendant, cannot be reconciled with this Court's repeated admonitions regarding the need for a separate due process analysis as to each defendant "individually" and the need to respect corporate distinctions. *See, e.g., Bestfoods, supra*; *Keeton, supra*.

The Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). By using a separate corporate entity as its U.S. distributor, Daimler has shown a clear intention *not* to avail itself of the protections and benefits of California law. The Ninth Circuit's opinion stretches agency law to reach the opposite result, and by treating two legal entities as one the Ninth Circuit denies Due Process.

F. The "Reasonableness" Test Confuses Specific and General Jurisdiction Criteria.

When either the "alter ego" or the "agency" test is satisfied, the Ninth Circuit evaluates the fairness and reasonableness of the assertion of jurisdiction, considering factors such as the extent of the purposeful interjection, the burden on the defendant, the extent of conflict with sovereignty of the defendant's State, and the forum's interest in adjudicating the dispute. *Bauman*, 644 F.3d at 920, 924-25. Under the reasonableness test, the burden shifts to the defendant, who must provide compelling reasons that the exercise of jurisdiction is unreasonable. *Id.* at 924.

A reasonableness test makes sense when a court asserts specific jurisdiction because a large corporation likely can more easily litigate in a distant forum, whereas a small company with limited resources may have significant difficulties litigating in a distant forum. *Burger King*, 471 U.S. at 477. But the "agency" test claims to demonstrate that a corporation is "at home" within the State, *see Goodyear*, 131 S.Ct. at 2851, and if the agency test really showed the subsidiary to be the manifestation of the parent company's presence in the forum State, the reasonableness test would be superfluous because a place where a defendant is "home" must, *ipso facto*, be a reasonable place for it litigate. The positing of the "reasonableness" requirement when considering general jurisdiction suggests that the Ninth Court is "hedging" and does not really believe the foreign corporation to be at home in the forum.

II.

THE "STRONG INTEREST IN ADJUDICATING AND REDRESSING INTERNATIONAL HUMAN RIGHTS ABUSES" PROVIDES NO BASIS FOR EXPANDING GENERAL JURISDICTION.

A. The Ninth Circuit's Holding Is Directly Contrary to This Court's Recent Precedent.

According to the Ninth Circuit, *all* "American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses." *Bauman*, 644 F.3d at 927. The court therefore concluded that it would "comport[ ] with fair play and substantial justice" for a federal court in California to adjudicate this dispute between foreign plaintiffs and a foreign defendant based on alleged foreign conduct committed by a foreign subsidiary in a foreign country. *Id.* The Ninth Circuit's assertion of United States courts' "strong interest in adjudicating and redressing international human rights abuses" as a reason for exercising general jurisdiction is, we submit, directly contrary to the teaching of this Court and a *non sequitur*.

In *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) this Court held that there is a strong

presumption against extraterritorial application of U.S. law. "[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, *id.* at 1669. More directly relevant to this case, this Court said in *Kiobel* "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Id.*

In the predecessor to *Kiobel*, Royal Dutch Petroleum had been found by the Second Circuit to be subject to general jurisdiction under the Second Circuit's "agency test" which is similar to the Ninth Circuit's test. The Ninth Circuit relied heavily on the Second Circuit's reasoning in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 542 U.S. 941 (2001). In *Wiwa*, Netherlands and United Kingdom corporations were held to be subject to general personal jurisdiction in New York because an investor-relations office in that State, formally part of a U.S. subsidiary, "perform[ed] investor relations services on the [foreign] defendants' behalf." *Id.* at 96. Because the Second Circuit deemed these services to be "sufficiently important to the foreign entit[ies] that the [foreign] corporation[s] would perform equivalent services if no agent were available," it concluded that the New York investor-relations office was an "agent[

] of the defendants for jurisdictional purposes." *Id.* at 95. The Second Circuit found that these imputed "contacts go well beyond the minimal" and that there was "nothing in the Due Process Clause [that] precludes New York from exercising jurisdiction over the defendants." *Id.* at 99. As here, there was no allegation in *Wiwa* that the foreign defendants and their domestic affiliate were alter egos.

We submit that *Kiobel* implicitly overruled *Wiwa*. In *Kiobel* the corporate defendant was not deemed present for purposes of application of the Alien Tort Statute, and it is only logical that if the Court had considered the general jurisdiction question, it would have found Royal Dutch Petroleum not to have been "at home" and it would have found there not to be general jurisdiction. *Kiobel* strongly suggests that United States courts do not have jurisdiction based on an interest in vindicating human rights where none of the parties are United States entities, the underlying events giving rise to the claims occurred within the territory of a foreign sovereign, and courts of other nations have jurisdiction over the parties.[16]

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[16] In addition, Respondents' claims under the Torture Victims Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note are no longer viable under this Court's holding in the *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702 (2012)

(continued...)

The Ninth Circuit's predicate for finding jurisdiction to "adjudicat[e] and redress[ ] international human rights abuses," *i.e.*, that "the claims in this case are "predicated upon the ATS and TVPA," *Bauman*, 644 F.3d at 927), no longer exists because of this Court's decisions in *Kiobel* and *Mohamad*.

B. The Exercise of General Jurisdiction Over Foreign Corporations in the Circumstances Presented Here Would Undermine the United States' Foreign Trade and Foreign Affairs Interests.

Under the Ninth Circuit's expansive assertion of general jurisdiction, a foreign company would be amenable to suit in the United States on a claim brought by a foreign plaintiff based on foreign conduct as long as the company has a domestic subsidiary that, subject to the parent's right of control, is providing services that the parent would secure "by other means" if the subsidiary were not available. Under this standard, adopted by the Ninth Circuit to enable United States courts to "adjudicat[e] and redress[ ] international human rights abuses" (*Bauman*, 644 F.3d at 927), many foreign companies could be subject to general personal jurisdiction in the United States. This

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[16](...continued)
that the TVPA does not apply to corporations.

Court has cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (quoting *United States v. First Nat'l Bank*, 379 U.S. 378, 404 (1965)) (internal quotation marks omitted).

In a similar case, the Executive Branch has emphasized that a "State's excessive assertion of general jurisdiction potentially threatens particular harm to the United States' foreign trade and diplomatic interests." Br. for the United States as *Amicus Curiae* Supporting Petitioners at 12, in *Goodyear*, 131 S.Ct. 2846 (2011). Such claims of expansive jurisdiction by American courts "may dissuade foreign companies from doing business in the United States, thereby depriving United States consumers of the full benefits of foreign trade," and might "equally dissuade[ ] . . . United States corporation[s] concerned about facing a similar rule abroad . . . from exporting [their] products." *Id.* Further, "foreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Id.* at 33.

CONCLUSION

The Ninth Circuit's assertion of jurisdiction over a party that has consciously structured its commercial relationships to avoid general jurisdiction in the United States, in a case that arises from events that took place entirely abroad and was brought by parties with no connection to the United States, is an unwarranted extension of general jurisdiction. It is based on a desire to vindicate human rights that, although idealistic, is not appropriate and vilolates the foreign defendant's Due Process rights.

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

July 5, 2013

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AMICUS CURIAE BRIEF

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DAIMLERCHRYSLER AG,
Petitioner,

v.

BARBARA BAUMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

No. 11-965

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICA CURIAE* PROFESSOR LEA BRILMAYER SUPPORTING PETITIONER

INTEREST OF *AMICA CURIAE*[1]

Professor Lea Brilmayer is the Howard M. Holtzmann Professor of International Law at Yale Law School. In almost forty years of law teaching, she has taught either as permanent or visiting faculty at Columbia Law School, the University of Texas Law School, the University of

[1] Pursuant to this Court's Rule 37.6, *amica* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amica* and her counsel made such a monetary contribution. Petitioner's and respondents' letters consenting to the filing of all *amicus* briefs are on file with the Clerk's office.

Chicago Law School, Harvard Law School, New York University Law School, Michigan Law School, as well as Yale. She has taught the law of personal jurisdiction dozens of times, as part of courses on Conflict of Laws and Civil Procedure.

Professor Brilmayer is probably America's most widely cited contemporary scholar writing on personal jurisdiction. She has also carved out this country's most distinctive voice on choice of law and federal extraterritoriality. Her interest in the problem of "veil piercing" in the personal-jurisdiction context is predominantly academic, and she works for greater clarity and intellectual integrity for the role of the Due Process Clause in accommodating both plaintiffs and defendants within our federal system of adjudication. But her interest is also practical. She acted as lead counsel for the respondent in *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and she works with a keen awareness of the importance of these conceptual doctrines for individual and corporate plaintiffs and defendants whose lives and financial interests depend on the smooth functioning and predictability of the American judicial system.

This Court has relied on Professor Brilmayer's numerous articles on the subject in a number of major general-jurisdiction cases. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2851, 2854, 2857 (2011) (relying upon Brilmayer et al., A General Look at General Jurisdiction, 66 Tex. L. Rev. 721 (1988), and Brilmayer & Paisley, Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency, 74 Cal. L. Rev. 1 (1986)); *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.9 (1984) (citing Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 S. Ct. Rev. 77, 80-81).

SUMMARY OF ARGUMENT

While vocally professing allegiance to the standards for general jurisdiction that this Court has developed with consistency and care over the last half-century, the Ninth Circuit quietly disregarded those standards at key junctures. Most importantly, its unprecedented and illogical extension of the concept of "agency" caused its departure from established law. By relying on its inflated agency theory, the Ninth Circuit circumvented this Court's requirement that jurisdiction must be proven as to *each defendant*. To do otherwise—to assert jurisdiction over one defendant based on the forum contacts of a *different* defendant or even a non-party—the Court must be confident that the two are sufficiently fused to satisfy alter-ego or merger requirements. There is no justification for permitting courts to treat two entities as identical in jurisdictional contexts because of a purported "agency" relationship if that relationship would not justify treating the two entities alike in other contexts, such as shared legal responsibility for alleged wrongs.

If affirmed by this Court, the Ninth Circuit's approach would remake the law of general jurisdiction, providing plaintiffs with almost unlimited opportunities to sue defendants with few, if any, connections to the forum. The Ninth Circuit's justification included expanding jurisdiction to accommodate what it considered to be contemporary conditions of transportation and communication. But this Court has expressly rejected that exact line of reasoning as inconsistent with the Due Process "minimum contacts" standard. This Court has also emphasized predictability, a value that would be sacrificed by the Ninth Circuit's "enlightened" approach. The only "predictable" result of that approach would be an unprecedented but almost random expansion of general jurisdiction.

ARGUMENT

This Court has reiterated that jurisdiction requires a showing of minimum contacts. More than fifty years of general-jurisdiction cases has generated a fairly simple and relatively stable approach that includes listing the dispute's contacts with the forum; determining which of these contacts are attributable to the defendant; and then comparing the resulting list to important general-jurisdiction precedents. The Ninth Circuit's opinion fails at all three of these, most particularly the second. Attribution is not an *ad hoc* process of searching for excuses to count against the defendant events for which it bore no substantive responsibility. It is the principled application of pre-existing substantive rules, such as corporate-veil piercing and liability of principals for the actions of agents. For these reasons, the Ninth Circuit's approach contravenes this Court's precedents and the jurisdictional values of the Due Process Clause. It should be reversed.

A. Because the Ninth Circuit found general jurisdiction without satisfying a "merger" or "alter ego" standard, it departed from what due process permits

Even the Ninth Circuit recognized that petitioner (Daimler) and its subsidiary (MBUSA) were distinct entities, with contractual relationships binding them, Pet. App. 8a-15a, and that it would be improper to subject one to liability for the deeds of the other, *id.* at 21a-22a & n.12. It should have ended its inquiry there, because unless the two entities were sufficiently united to share responsibility, they could not be sufficiently united to share forum contacts.

1. The Ninth Circuit did not dispute that a court asserting jurisdiction over a defendant must, among other

things,[2] ascertain which contacts with the forum are attributable to that defendant. Pet. App. 20a. Ordinarily, there is no serious difficulty about determining which party is responsible for the various forum contacts; the responsible party will have directly engaged in the conduct that led to the forum contacts.

There are, however, various forms of vicarious liability in American law—agency law, conspiracy law, certain rules of corporate law ("piercing the corporate veil"), and others. Is the principal responsible for the actions of the agent (or vice versa)? Is an employer responsible when one employee injures another? Are parents responsible for injuries caused by their children? Are co-conspirators liable for each others' torts or crimes? Is a parent corporation or a stockholder responsible for the delicts of a wholly owned subsidiary (or the other way around)? Each question requires further inquiry as to when and to what extent any vicarious liability applies. Rules answering these questions, in the affirmative in certain circumstances, spread legal responsibility more broadly than simply placing it on the party whose hands were most immediately touching the problem.

Generally speaking, these rules fall into two categories. An act by one party might be "attributed" to another party if there is a substantive rule that distributed legal responsibility between the two of them for *that specific act*. This theory, which no one contends plays any role in this case, Pet. App. 20a, applies to specific jurisdiction, for where the cause of action arises in the forum, only a small number of forum contacts need to have occurred. The plaintiff can sue either or both of the defendants, as he chooses; the primary defendant because he was "hands on" responsible, and the secondary defendant

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[2] See Part B, *infra*, for a discussion of the additional steps that are required for asserting jurisdiction over a defendant.

because of the contribution he made through his relationship with the first defendant.

This case, however, turns on general jurisdiction. The appropriate concept here is "merger." With general jurisdiction, defendants are expected to defend in the forum on *any* cause of action whatsoever; the identification between the two ostensibly differently individuals is complete, not event-specific as with attribution. For this to happen, the connection between the two defendants must be very close—almost a wholesale fusion of the two. With the two defendants so close that one is "a mere instrumentality," or "an alter ego," of the other, it follows that whatever contacts one defendant has with the forum automatically can be charged against the other defendant as well. They are not, in fact, two separate corporations, but one.

In essence, respondents seek to make that argument in this case. They claim that Daimler and MBUSA are tied so closely together that any contacts between MBUSA and California are automatically chargeable to Daimler. There is at least some general agreement on this abstract point. The Ninth Circuit, Daimler, and respondents all recognize that where defendants are extremely close, they might in fact count as only a single entity.

The point of difference, however, is important: What standard should be used to determine whether the two defendants are "close enough"? There are two choices. Either the court employs the same preexisting standard as would be used to answer that question as a matter of domestic law in any other context, or the court creates a new standard to decide whether "jurisdictional veil piercing" is permissible even if it would be impermissible in all other situations. The first choice—requiring consistency in all contexts—is the only one that avoids serious negative consequences to this Court's precedents or to com-

mon sense.

2. Respondents here, or any party seeking to deviate from the common-sense proposition that the standards should be the same, must satisfy a heavy burden of persuasion: Why, in a given situation, is it proper to attribute jurisdictional contacts from one entity to another, despite no substantive rule of law that allows attributing responsibility based on the *same relationship*? Decoupling "jurisdictional" contacts from "responsibility" contacts ultimately generates incoherence. After all, it is the substantive law that creates the justification for imposing a burden on an individual in the first place; until the state adopts a substantive law that distributes responsibility, no plaintiff has any basis for recovery *against anyone*. What makes vicarious responsibility possible at all is the very web of substantive legal rules that prescribe the attribution of responsibility discussed above.[3]

Rules for piercing the corporate veil or for merging two corporations in the jurisdictional setting are justified by, and should reflect, the same policies as the rules for piercing the corporate veil or for merging two corporations in the non-jurisdictional setting. The substantive point in both contexts is the same—it is to allow distinct entities to be treated separately unless they are *not actually separate*. See Brilmayer & Paisley, Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency, 74 Cal. L. Rev. 1, 12, 14 (1986). Properly understood, changing the veil-piercing standard

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[3] A state could, conceivably, spread responsibility so far and in such an attenuated fashion that its substantive laws would violate the Due Process Clause. That limitation would, under the approach described here, be coterminous with due-process limitations on attributing jurisdictional contacts. Thus, while there should never be a case in which two entities are identical for liability but not jurisdictional purposes, there is an outer boundary beyond which state law may not pass.

as part of the jurisdictional inquiry amounts to judicial subversion of the substantive law of a state.

For example, in *Rush* v. *Savchuk*, Savchuk, who had been injured in Indiana in an accident while Rush was driving, wished to sue in Minnesota, a forum which (unlike Indiana) would not bar his claim. 444 U.S. 320, 322, 325 n.8 (1980). Rush had no connection to Minnesota to support *in personam* jurisdiction. *Id.* at 322, 327. Savchuk therefore proposed a jurisdictional theory closely analogous to the Ninth Circuit's here—that he could sue Rush in Minnesota because Rush's insurance company did business, and was subject to suit, in Minnesota. *Id.* at 322-324, 326, 328, 330. In short, as to jurisdiction, Savchuk proposed in effect simply to ignore Rush, the *actual defendant*, and look to the contacts of an insurance company which had contracted with Rush in Indiana, and which merely happened to do unrelated business in Minnesota.

This Court rejected the argument that courts could proceed without showing that Rush had sufficient forum contacts *of his own*.[4] In so doing, it rejected Savchuk's proposal to rewrite the substantive law that made the individual defendant the real party in interest. Accordingly, this Court refused in *Rush* to allow attribution, using reasoning that is directly relevant to this case. The Court expressly rejected the Minnesota courts'

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[4] "[I]t is unlikely," the Court dryly noted, "that [Rush] would have expected that by buying insurance in Indiana he had subjected himself to suit in any State to which a potential future plaintiff might decide to move. In short, it cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable, merely because his insurer does business there." *Rush*, 444 U.S. at 329 (citations omitted).

> attemp[t] to attribute State Farm's contacts to Rush by considering the 'defending parties' together and aggregating their forum contacts in determining whether it had jurisdiction. The result was the *assertion of jurisdiction over Rush based solely on the activities of State Farm.* Such a result is *plainly unconstitutional.*

Rush, 444 U.S. at 331-332 (emphases added). As discussed in greater detail below, the guiding principle is that "[t]he requirements of *International Shoe* * * * must be met as to *each defendant* over whom a state court exercises jurisdiction." *Id.* at 332 (emphasis added).

Admittedly, there are those who believe that formal corporate boundaries are mere nuisances to be brushed aside when inconvenient—just as there are those who regard alleged tortfeasors like Rush as merely "nominal defendants." Cf. *Savchuk*, 444 U.S. at 330 (rejecting that characterization). To those holding either view, requiring individual defendants even to be part of the case, let alone requiring their own minimum contacts with the forum, may seem like foolish policies. But they are the policies that the state's own legislature adopted, and it is not for the local federal courts to undercut those policies *sub silentio* under the guise of altering the law of personal jurisdiction.

3. Absent a specific-jurisdictional basis, therefore, nothing short of the "merger" or "alter ego" standard can satisfy the Due Process Clause's requirement that jurisdiction over each defendant be shown individually. See Part B.1, *infra* (further discussing this Court's refusal to permit aggregation of contacts). Thus, unless Daimler and MBUSA are essentially identical, sufficient contacts with the forum must be shown *for Daimler*, and not simply for MBUSA.

But even the Ninth Circuit cannot realistically contend that Daimler and MBUSA are identical. That court was well aware of the differences between the novel attribution rule it was proposing for jurisdictional purposes and the familiar domestic substantive law of attribution. It openly acknowledged that, under conventional domestic law of agency and corporations, Daimler would not be held responsible along with MBUSA; nor would corporate law, under these circumstances, allow the plaintiffs to "pierce the corporate veil." Pet. App. 21a-22a & n.12 (discussing law of agency and observing that the "alter ego" test is not satisfied).

This should be enough to resolve this case, and the Ninth Circuit's decision to proceed further on the dubious pathway described below is reason enough to reverse. This Court has a clear choice. It can follow its own carefully developed precedents, or it can adopt the Ninth Circuit's new standard. Because those precedents are consistent with due process, and the Ninth Circuit's test is not, the Court should reverse the judgment below.

B. Personal jurisdiction should turn on actual forum contacts for which defendants are responsible

Although the most expedient resolution of the case is described in Part A, *supra*, the failings and negative consequences of the Ninth Circuit's decision are far more extensive. The rest of this brief shows how that opinion is flawed from the vantage point of well-established law.

1. *To establish general jurisdiction, plaintiffs must show "continuous and systematic" contacts between* each defendant *and the forum*

The Court of Appeals introduced its discussion of personal jurisdiction with the conventional distinction between general and specific jurisdiction, acknowledging that "when the cause of action does not arise out of or re-

late to the foreign corporation's activities in the forum State, the State is exercising general jurisdiction over the defendant." Pet. App. 19a-20a (internal quotation marks and citation omitted). Indeed, "plaintiffs press *only* general jurisdiction over [Daimler]." *Id.* at 20a (emphasis added). That is unsurprising, given that the cause of action had arisen in Argentina and the facts have no apparent bearing on anything that ever happened in California. See Pet. App. 2a-4a. In this case, therefore, either there is general jurisdiction, or no jurisdiction at all.

Establishing general jurisdiction requires a substantial effort. This Court has repeatedly held that the Due Process Clause requires a showing of "continuous and systematic" contacts between the defendant and the forum. The "continuous and systematic" test for assertion of general jurisdiction is generally ascribed to *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 438, 445 (1952). Although formulated six decades ago, the *Perkins* standard remains authoritative. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2856-57 (2011); *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 415-416 (1984).

The court below applied the "continuous and systematic" test to the relationship that California had with MBUSA, holding the standard satisfied. Pet. App. 20a-21a. But MBUSA was not even a party. The Ninth Circuit's test left the *actual defendant* unaccounted for. It was not MBUSA, but Daimler, that the plaintiffs wanted to sue.

This deficiency should be fatal, because this Court mandates that contacts be shown for *every defendant* over whom jurisdiction is sought. As noted above, *Rush* v. *Savchuck* removed all doubts: "The requirements of *International Shoe* * * * must be met as to each defendant over whom a state court exercises jurisdiction." 444 U.S. at 332.

Several years later, the Court spoke even more directly to cases, like this one, raising questions about corporate structure: "[N]or does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary," because "[e]ach [corporation's] contacts with the forum State must be assessed individually." *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984). This principle follows directly from Justice Brandeis's opinion for the Court in *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, which made clear that maintaining corporate formalities between a parent and a subsidiary prevents automatic attribution of the subsidiary's forum contacts to the parent, even when the parent exercises far more control, and even domination, of the subsidiary than has been alleged here. 267 U.S. 333, 336-337 (1925).

It was therefore incumbent on plaintiffs, and the Ninth Circuit, to show sufficient contacts with California for Daimler, and not simply for MBUSA. But there are almost *no* contacts tying Daimler to California. The Ninth Circuit evaded the consequence of that lacuna by devising an entirely different approach. Focusing on the relationship between Daimler and MBUSA (rather than Daimler and California), the panel below held that *MBUSA's* contacts with California were sufficient to establish general jurisdiction, and that MBUSA's contacts could be attributed to Daimler. Accordingly, as if by transitive logic that no one could refute, the court of appeals held that MBUSA's contacts were sufficient to establish general jurisdiction over Daimler on an "agency" theory. Pet. App. 3a, 23a.

2. *The court below relied on dubious definitions and assumptions about agency to subject Daimler to general jurisdiction*

The Ninth Circuit was not swayed by the fact that Daimler and MBUSA had scrupulously maintained all

corporate law formalities necessary to ensure MBUSA's independent legal status. It simply declared there to be an "agency" relationship that short-circuited the need for further analysis. But its "agency" theory relied upon a series of dubious assumptions, including a novel definition of "agency" centered on the "importance" of the services that the "agent" performs. As shown below, each link in the entire chain of reasoning, from start to finish, is inconsistent with the Due Process safeguards that this Court has recognized as protecting defendants from having to litigate in forums with which they have no minimum contacts.

a. The Ninth Circuit's definitions of "agency," "control," and the "importance" of services provided, are unprecedented and illogical

The Ninth Circuit's definition of "agency" is highly counterintuitive from the outset. A subsidiary such as MBUSA, it explained, could count as an "agent" for jurisdictional purposes when it performed "important" services. Pet. App. 22a. Services were "important," in turn, if (should the agent become unable to provide them) a substitute source would have to be found or the principal would provide them itself. *Ibid.*[5]

It is not at all clear what, if anything, the "importance" of the services provided should have to do with the question of whether or not an "agency" relationship exists. The term "agency" is not usually defined by substantive criteria about the significance of the stakes. Surely principal/agent relationships can exist where the stakes are relatively trivial—just as there might be no agency rela-

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[5] "For the agency test, we ask: Are the services provided by MBUSA sufficiently important to Daimler that, if MBUSA went out of business, Daimler would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative?" Pet. App. 22a.

tionship in a dispute where the stakes are large. In any event, this approach to agency finds no support in this Court's personal jurisdiction jurisprudence.

After all, whenever this "test" is invoked, it is likely to generate a pro-jurisdiction outcome. It is difficult to conceive what, if anything, this definition of agency excludes. If a service was cost-effective enough to have been arranged in the first place, why *wouldn't* Daimler want to either establish in-house capacity or else hire a replacement? And what possible light could these questions shine on the existence of Daimler's supposed "continuous and systematic" activities in California? More generally, it is difficult to see why the "importance" of the subsidiary's duties under its arrangement with the parent would show anything at all about whether the parent was present in California.

The Ninth Circuit listed a second criterion for the agency test—the element of control. Pet. App. 22a-23a, 26a-30a. The opinion made quite clear that "control" was secondary. "[W]hen we consider control here," it wrote, "it is as part of a test that primarily considers whether the services are of 'sufficient importance.'" *Id.* at 28a. "[T]he principal focus of our agency test for purposes of personal jurisdiction is the importance of the services provided to the parent corporation." *Id.* at 26a.

The control that the Ninth Circuit required was insubstantial and as illusory as its "importance" requirement. The court expressly stated that the level of control required to subject a parent to general jurisdiction was far less than that required for the "alter ego" theory of personal jurisdiction. Pet. App. 22a & n.12. In addition, the principal did not have to *actually exercise control*, or even be *in a position* to do so; it was enough that the parties recognized that the principal had a theoretical right to control the agent. Pet. App. 26a-29a.

The opinion also stated clearly that the "control" that in theory had to exist could come from a *contract* rather than from the corporate-law relationship of parent to subsidiary.[6] It announced that

> whether the alleged general agent was a subsidiary of the principal or independently owned is irrelevant. Independent contractors may be considered representatives, and contracting with an independent contractor to achieve the same end—distributing cars in the United States—means, in practice, obtaining a representative to undertake substantially similar services.

Pet. App. 25a (internal quotations omitted). In other words, the evidence of "control" necessary to satisfy the requirement can be nothing more than *standard contractual obligations*—merely the supposed "agent's" obligation to perform under a contract.[7]

b. The Ninth Circuit's "agency" approach cannot square with this Court's precedents

This Court addressed a version of this problem in *Helicopteros*. The defendant, "Helicol," was a Colombia corporation that provided helicopters for oil and con-

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[6] The Ninth Circuit does not justify substituting a *contractual* relationship when the issue of *agency* is ostensibly comparable to the corporate-law question of piercing the corporate veil.

[7] The consequences of even this step in the Ninth Circuit's analysis are remarkable. Because contract partners as well as corporate affiliates can qualify as "agents" under the Ninth Circuit's definition, jurisdiction over the defendant would be permitted not only where the *defendant's* subsidiaries are subject to general jurisdiction, but also where some of its suppliers and other contract partners are subject to general jurisdiction. The problem cascades—each of *those* "agents" has "agents" of its own. Every time that Daimler—or anyone else—takes on a new contract partner, it would risk unintentionally subjecting itself to general jurisdiction, perhaps in many states, without any ability to order its affairs to preclude that result.

struction companies. It had signed a contract with Consorcio, a Peruvian company, and Consorcio's Texas alter-ego, WSH, for helicopter services in Peru. The cause of action arose out of a crash in Peru, and the question was Helicol's amenability to suit in Texas. 466 U.S. at 409-413.

If the Ninth Circuit's reasoning below was correct, then a central issue in *Helicopteros* should have been the attribution to Helicol of the Texas connections of WSH and Consorcio. Both WSH and Consorcio would have been subject to general jurisdiction in Texas, because the headquarters of WSH was in Houston and Consorcio was not merely a parent, but WSH's "alter ego." 466 U.S. at 410. Under the Ninth Circuit's analysis, Helicol had "control" of an entity that was unquestionably subject to general jurisdiction in Texas, whose responsibilities were undeniably "important." The combination of the contractual relationship between Helicol and Consorcio/WSH with the fact that the latter joint venture was subject to general jurisdiction in Texas would have provided the plaintiffs in *Helicopteros* with a strong argument for general jurisdiction in Texas over Helicol. No such argument seems even to have been made at any point in that case.

Nor would there have been any reason to make that argument. As illustrated in this case, none of these definitional requirements about "control" or "importance" ensure *any* connection—even the most minimal—between Daimler and the forum. For example, regarding the requirement of "control," the Ninth Circuit does not even state that the parent company must exercise control, or be able to exercise control, over the subsidiary's conduct *in California*. To the extent that any control is required, that control can be located *anywhere*. Similarly, requiring that the subsidiary provide "important" services does not, by itself, constitute a contact with Cali-

fornia, because the "important services" that the subsidiary supposedly provides need not be provided in California. So far as the Ninth Circuit's standard goes, if the subsidiary is subject to general jurisdiction in the forum, then no other contacts with the forum need be shown; in particular, the parent corporation need not have done anything, provided any services (important or otherwise), given any instructions, or asserted any control *in the forum*. Thus, far from ensuring constitutionally required minimum contacts with the forum, the Ninth Circuit obviates the need for any link whatsoever between the defendant and the forum.

This Court has used "agency" reasoning to justify personal jurisdiction, as when a defendant has consented to specific jurisdiction by appointing an agent for service of process for suits relating to a particular transaction. See, *e.g.*, *Nat'l Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311 (1964) (discussing and upholding use of agency reasoning where agreement to appoint an agent for service of process was contained in the contract underlying the dispute).[8] A state may condition the use of its highways upon agreement to appoint the state's attorney general as agent for receipt of service of process for accidents arising out of that use. See *Hess* v. *Pawloski*, 274 U.S. 352 (1927); *Kane* v. *New Jersey*, 242 U.S. 160 (1916). But none of this Court's cases have used "agency" to impose *general* jurisdiction under circumstances remotely approaching this case's.

3. *The Ninth Circuit should have determined general jurisdiction by identifying forum contacts, assessing responsibility, and comparing the facts of the case to authoritative precedent*

The Ninth Circuit's logic is misguided and unworkable, but that does not negate the appeal of its decision in

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[8] One could presumably consent to general jurisdiction as well.

one respect. Its focus on "agency" and "control" is at least partially motivated by the awareness that, in certain cases, more than one entity may be responsible for the occurrence of certain events, as noted above. See Part A, *supra*. There are numerous ways in which responsibility for the forum contacts is shared among the defendant and others. When the named defendant is at least in part responsible, the question arises whether that partial responsibility constitutes a sufficient reason to attribute to it the forum contacts.

The most straightforward and intuitively simple method for assessing the adequacy of contacts is the one most in keeping with existing precedent. It consists of only three steps. First, all of the connections with the forum (here, California) should be identified. Second, it should be ascertained which of these contacts are attributable to the defendant (here, Daimler). Third, it should be determined whether the contacts that *are* attributable to the defendant (Daimler) are sufficient to meet the "continuous and systematic" standard derived from foundational cases like *Perkins*, *Helicopteros*, *Goodyear*, and other general-jurisdiction precedents.

The second step is the key one in this case, and it was addressed in Part A, *supra*, because it could resolve the case standing alone. The first and third steps are not unique to cases like this one; they are, in fact, identical in almost all personal jurisdiction cases that this Court has decided over the last half century. Yet the Ninth Circuit did not even properly undertake those steps. It proceeded without evidence of forum contacts and ultimately found that jurisdiction exists because of a relationship between MBUSA and Daimler, rather than by reference to existing precedent.

The tell-tale sign that the Ninth Circuit strayed from this Court's precedents is its avoidance of the question of Daimler's contacts with California. Daimler undeniably

had structured its conduct so that there were not enough direct contacts between it and California to satisfy the "continuous and systematic" test.[9] This is hardly atypical or illegitimate, as this Court has long recognized.[10] The Ninth Circuit avoided this problematic fact by devising a test that has nothing to do with contacts between the forum and the defendant, instead merely taking into account some or all of the contacts that tied MBUSA to California. The court's method focuses wholly on directly comparing the two entities. Instead of basing jurisdiction on events occurring in the forum, its attention was largely preoccupied with listing rights and duties that MBUSA and Daimler *owed one another* under the contract. There are several reasons that this is problematic.

First, the court did not dispute that it was provided no evidence that these abstract rights and duties corresponded to actual occurrences; these were merely hypothetical rights and duties. The court suggested that in this context, what mattered was not what actually happened, but what *might have* happened.[11] As the court put it, with its own added emphasis, "the principal need not *exercise* control at all in order to preserve an agency re-

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[9] For example, the relationship between Daimler and MBUSA specified by contract that MBUSA would take title to the autos before they left Germany. Pet. App. 8a.

[10] See, *e.g.*, *Cannon*, 267 U.S. at 336 ("The defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the State in its corporate capacity. * * * It preferred to employ a subsidiary corporation. Congress has not provided that a corporation of one State shall be amenable to suit in the federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein.").

[11] *E.g.*, Pet. App. 27a ("A principal has control when it 'has the right to give interim instructions or directions to the agent once their relationship is established.").

lationship; the relevant inquiry, rather, is whether the principal has the *right* to control." Pet. App. 28a. Considering that numerous Supreme Court precedents frame the jurisdictional inquiry in terms of minimum contacts, this open lack of concern for identifying the events connecting the forum to the defendant is highly suspect from the outset.

Moreover, even if the contingencies mentioned in the contract did take place, there is no indication that any of them took place in California. The contract structured the relationship between MBUSA and Daimler for the entire United States, and the extensively quoted contract sections in the opinion, see Pet. App. 9a-15a, never specifically single out California. If more than almost nothing at all happened in California, it is not evident from anything in the Ninth Circuit's factual description.[12]

These two points come together in an important way. To determine general jurisdiction, a court needs to know (1) which events actually occurred and (2) that they occurred in the forum. Events occurring elsewhere, or events that may never have taken place at all, are no substitute. General jurisdiction depends on the mass, or quantum, of contacts between the forum and the defendant. If the court knows that a certain number of events took place under the contract in the U.S. as a whole, but does not know how many took place in California, then it *cannot* arrive at a sound conclusion about whether the "continuous and systematic" test was met. Conversely, if the events were all limited to California's territory, but it was not known how many were real and how many were simply abstract rights, it would also be impossible to say whether the "continuous and systematic" standard had been met. To answer that question, it must be known

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[12] The few connections that were adduced are listed in the opinion below at Pet. App. 31a-32a.

how many things had actually happened in California. And, tellingly, the Ninth Circuit has little to say on that score.

C. Contrary to this Court's oft-expressed due-process values, the Ninth Circuit's test generates a vast, unpredictable, but almost limitless expansion of general jurisdiction

If this Court were to adopt the Ninth Circuit's test, the resulting expansion in general jurisdiction would be unprecedented. Moreover, it would be impossible for any entity to say with confidence at any point *precisely where* it was subject to general jurisdiction. This prospect does not trouble the Ninth Circuit, but it contravenes the due-process values that this Court has repeatedly articulated.

1. *The Ninth Circuit's test presages a vast expansion of general jurisdiction*

The magnitude of the expansion of jurisdiction that would follow from the Ninth Circuit's judgment can be illustrated by considering a sample transaction. Hiring a law firm is one category of transactions that, under the Ninth Circuit's definition, must be classified as "important." The element of control is satisfied, as well. Clients undoubtedly have the legal right to be informed and to make their own decisions, and generally to assert control over their lawyers with respect to the matters for which the lawyers were retained.

Assume, then, that Daimler retains ABC, a typical large modern law firm; this most probably makes ABC an "agent" of Daimler, according to the Ninth Circuit's reasoning. As a "typical large modern law firm," ABC almost certainly does business (and is subject to general jurisdiction) in a number of states around the country. Under the Ninth Circuit's logic, the simple act of retaining ABC could immediately subject Daimler to general jurisdiction everywhere that ABC is subject to general

jurisdiction. It would not matter whether Daimler did any business of its own in any of the states where ABC was subject to suit, because jurisdiction would be based on ABC's contacts, imputed to Daimler via the "agency" relationship that supposedly connects Daimler to its legal service providers.

This approach would make it difficult or impossible to structure one's conduct and affairs so as to avoid subjection to general jurisdiction, which would become almost entirely unpredictable. Under the Ninth Circuit's reasoning, there is no way of knowing, when entering into a contract, what obligations to defend will follow. This is especially the case given that the other party will almost certainly continue to enter into new contracts, or may well engage in tortious conduct, after its contract with the defendant is already finalized.

Indeed, Daimler could not know where it will be required to defend even if it determined where its contractual partner has contacts. Just as Daimler would be subject under the Ninth Circuit's analysis to general jurisdiction in places where it had no contacts, so also would Daimler's agents already be subject to general jurisdiction in places where *they* had none. MBUSA, for example, has its own suppliers, contracting partners, and (perhaps) subsidiaries. Just as general jurisdiction over MBUSA would (under the judgment below) create general jurisdiction over Daimler, so also jurisdiction over MBUSA's contracting partners and subsidiaries—whoever they are—would give rise to jurisdiction over MBUSA. This cascading problem—what might be called "second generation" agents, or the agent of one's agent—illustrates that the uncertainty in the Ninth Circuit's analysis is both inherent and extreme. The closest it comes to certainty is the certainty that everyone is now subject to jurisdiction in far more places than ever previously imagined.

2. *The Ninth Circuit's test omits reference to this Court's basic due-process values*

The Ninth Circuit's indifference to the real-world implications of its method of determining jurisdiction—especially its vast but erratic expansion of jurisdiction—is inconsistent with this Court's longstanding due-process policies and values. Predictability continues to be central to this Court's jurisdictional due-process analysis. "'[T]he foreseeability that is critical to due process analysis * * * is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295 (1980)).

But if Daimler were subject to suit in California, based on the present facts, then it would likely be subject to suit in many other states, and presumably at numerous venues world-wide. Its only sensible assumption would be that it *is* subject to general jurisdiction everywhere—an assumption that defeats the entire point of requiring predictability. Short of giving up and submitting to global jurisdiction, Daimler would have no way of anticipating, and no way of preventing, widespread subjection to jurisdiction in fora with no substantive connection to the dispute.

The inherent unforseeability of the Ninth Circuit's approach is not that court's only departure from longstanding constitutional values. The Ninth Circuit placed extensive reliance on changing conditions of business and transportation, and the significance that these (supposedly) possessed for determinations of jurisdiction:

> In 1990, we held that "[i]n this era of fax machines and discount air travel, requiring the partnership to defend itself in California * * * would not be so un-

> reasonable as to violate due process." * * * Today, for better or for worse, we have moved past that era of fax machines to the current era of electronic-filing in which judges of this court must make a special request if we wish to receive the paper copy of some documents filed with our court. Now, in addition to discount airline travel, parties have the option of conducting video conferences with their clients, and can even, in some instances, conduct video depositions. These technological advances significantly lower the costs, financial and otherwise, of foreign corporations litigating cases in American courts.

Pet. App. 32a-33a (citation omitted).

The impact of changing technology on the due-process calculation of whether the defendant ought to be compelled to litigate in the plaintiff's chosen forum has been a perennial theme before this Court. As this Court first noted in 1957, "[i]n part this is attributable to the fundamental transformation of our national economy over the years." *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957). It continued:

> [M]any commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id. at 222-223. Thus, it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

But while the Court still acknowledges the impact of

these changes on the practicality of litigation, these concerns of convenience have been held to be subordinate to the sovereignty aspects of due process. As the Court wrote in *World Wide Volkswagen*, "[t]he limits imposed on state jurisdiction by the Due Process Clause" may well "have been substantially relaxed over the years," 444 U.S. at 292, but

> [n]evertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. * * * [T]he Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Id. at 293. Of course, not everyone is convinced. The emphasis on convenience and practicality—and the impact of modern technology on both of these—persists in dissenting opinions[13] and in opinions from lower courts

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[13] See, *e.g.*, *Helicopteros*, 466 U.S. at 422 (Brennan, J., dissenting) ("The vast expansion of our national economy * * * provide[s] the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause. * * * [O]ur economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the States more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions.").

later reversed by this Court.[14] This Court's opinions, however, never have elevated "modern conditions of transportation and communication" above territorial sovereignty in the jurisdictional calculus. There is no reason that this should change.

CONCLUSION

For any number of reasons, as described above, the Court should reverse the Ninth Circuit's judgment.

Respectfully submitted.

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[14] See, *e.g.*, *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring in judgment) (noting the Supreme Court of New Jersey's "broad understanding of the scope of personal jurisdiction based on its view that '[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade'") (citation omitted).

AMICUS CURIAE BRIEF

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INTEREST OF *AMICI CURIAE* [1]

Amici represent a diverse array of companies doing business across state lines and international bound-

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel nor any other entity other than *amici curiae*, their members or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to *amicus* briefs.

aries. Due to this interstate and international commercial activity, *amici*'s members, both domestic and foreign, have a keen interest in the rules governing when businesses can be subject to adjudicatory jurisdiction in the United States.

Amici's members have a special interest in the rules governing whether, and to what extent, non-resident companies can be subject to jurisdiction in a forum based on the contacts of other entities such as wholly owned subsidiaries. Some members, both foreign and domestic, maintain one or more subsidiaries that are directly affected by the Ninth Circuit's ruling. Others are small, family-owned businesses. Under the logic of the Ninth Circuit's decision, individual owners of these businesses, by virtue of their "right to control" those businesses, might be subject to general jurisdiction *in their individual capacities* in states other than where their businesses are incorporated or operate.

The Ninth Circuit's expansive approach to adjudicatory jurisdiction, coupled with its lenient standards for disregarding the separateness of corporate entities, threatens to disrupt the flow of goods and services across interstate and international boundaries; it also exposes *amici*'s members to unfair burdens in unfamiliar forums. *Amici* file this brief to explain the harm wrought by the Ninth Circuit's decision and to explain why it is irreconcilable with this Court's prior decisions on this important issue.

SUMMARY OF THE ARGUMENT

The Due Process Clause does not permit the exercise of general jurisdiction over a parent corporation, whether foreign or domestic, based on the in-forum contacts of its wholly owned subsidiary. In addition

to the reasons given in Petitioner's brief, which *amici* fully support, two additional ones justify this outcome.

First, general jurisdiction is available only in forums where a defendant is "at home." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011). Corporations, whether foreign or domestic, are "at home" only in the forums where they are incorporated or maintain their principal place of business. This rule flows directly from this Court's prior decisions charting the constitutional limits of general jurisdiction over nonresident corporations. It comports with the historical approach to those limits, which originally confined adjudicatory jurisdiction only to the forums where the corporation was chartered. This categorical rule advances the twin purposes underpinning those constitutional limits—namely the avoidance of conflict among sovereigns and the protection of defendants from unwarranted assertions of authority by sovereigns where they are not "at home." Finally, several practical considerations of special importance to foreign and domestic companies—including the ease of application, the promotion of foreign commerce, and the avoidance of tensions with foreign governments—support this rule.

Second, the Ninth Circuit's "agency" test is irreconcilable with this Court's prior decisions and the purposes underpinning the due process limits on adjudicatory jurisdiction. Those decisions, especially *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), set an extraordinarily high bar before a nonresident corporation will be deemed amenable to adjudicatory jurisdiction in a forum based on the activities of its subsidiaries there. This high bar

reflects the commonsense principle that each defendant's due process right to be free from unwarranted assertions of sovereign authority, like all constitutional rights, must be individually assessed. It also reflects the presumption of corporate separateness—a principle of great importance to companies, both foreign and domestic, that promotes, among other salutary goals, capital formation, credit extension, and regulatory compliance. The Ninth Circuit's "agency" test thwarts these principles. It upsets the reasonably settled expectations of foreign companies by placing ordinary relations with their American subsidiaries on a collision course with the lower court's diluted "right to control" test. It also exposes owners of this country's small businesses, the engine of job production today, to an unjustifiable risk that they will be haled into faraway forums.

ARGUMENT

For over a century, the Due Process Clause has constrained assertions of adjudicatory jurisdiction over nonresident defendants. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1878).[2] The due process limitations on a court's adjudicatory authority do not depend on

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[2] This concept is sometimes also referred to as "personal jurisdiction" or "judicial jurisdiction." This distinguishes it from other conflicts principles like *prescriptive jurisdiction* (also known as legislative jurisdiction), which concerns a legislature's ability to issue substantive rules regulating conduct, or *enforcement jurisdiction*, which concerns the rules governing the ability of a judgment creditor to satisfy a judgment. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (prescriptive jurisdiction); *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977) (enforcement jurisdiction).

whether the defendant is an individual or a juridical entity; nor do they depend on the nationality of the defendant. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288-89, 299 (1980).

Since *International Shoe*, those constitutional constraints are ordinarily measured in terms of "contacts" between the defendant and the forum state. 326 U.S. at 316. The constitutionally required quantum of contacts varies with the nature of jurisdiction being asserted. When the plaintiff's claims relate to the defendant's forum contacts, specific jurisdiction may lie. *See Goodyear*, 131 S. Ct. at 2855. Here, the parties agree that the plaintiffs' claims lack any relation to the contacts of Daimler AG, a German Aktiengesellschaft ("stock company"), with California. Pet. App. 20a.

When the plaintiff's claims are unrelated to the defendant's forum contacts, adjudicatory jurisdiction can lie only "when there are sufficient contacts between the [forum] and the foreign corporation" to satisfy the requirements of general jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). Here, Judge Reinhardt's panel opinion held that general jurisdiction would lie based on the contacts of Mercedes-Benz USA, LLC ("MBUSA"), an indirectly held subsidiary of Daimler AG.[3] In Judge Reinhardt's panel opinion, those contacts could properly be treated as Daimler AG's own because MBUSA was its "agent."

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[3] *Amici* use the term "Judge Reinhardt's panel opinion" to differentiate it from the original panel opinion that correctly held the Constitution prohibited the exercise of adjudicatory jurisdiction in this case. *See* Pet. App. 46a-61a.

That holding is incorrect—both for the reasons stated by Daimler AG and for two additional reasons explained in this brief. First, it exceeds the constitutional limits on general jurisdiction over corporations, which restrict such jurisdiction to an entity's state of incorporation or principal place of business. Second, and alternatively, the "right to control" test articulated in Judge Reinhardt's panel opinion flouts the constitutional limits of adjudicatory jurisdiction set forth in this Court's prior opinions and is inconsistent with the purposes underlying those limits.

I. Corporations Are Subject To General Jurisdiction Only In Their States Of Incorporation And Principal Place Of Business.

Under this Court's precedents, general jurisdiction over corporations lies only in forums where they are incorporated or maintain their principal place of business. This rule comports with the history of the due process limits on adjudicatory jurisdiction and promotes the functions served by those limits. Finally, several practical considerations support this rule.

A. This Court's prior decisions narrowly define the forums that may exercise general jurisdiction over corporate defendants.

International Shoe highlighted the constitutional significance of the relationship between a plaintiff's claims and a defendant's activities in the forum state. Though not employing the phrase "general jurisdiction," *International Shoe* did speak in terms of "instances in which the continuous corporate operations within a state were thought so substantial

and of such a nature as to justify suit against it on cause of action arising from dealings entirely distinct from those activities." 326 U.S. at 318. Subsequent academic research[4] described these "instances" as "general jurisdiction," a term this Court later formally incorporated into the doctrine. *See Helicopteros*, 466 U.S. at 416.

Since *International Shoe*, this Court has surveyed the constitutional boundaries of general jurisdiction over corporations three times. Most recently, in *Goodyear*, this Court unanimously held that general jurisdiction could not lie based upon the nonresident defendants' sales of goods to the forum state (North Carolina). Central to this conclusion was the Court's belief that such sales did not render these corporations "essentially at home in the forum State." 131 S. Ct. at 2851. In the Court's view, corporations were "at home" in places equivalent to the domicile of an individual. *Id.* at 2853; *see also Milliken v. Meyer*, 311 U.S. 457, 462 (1940). These consisted of the corporation's place of incorporation and principal place of business. *Goodyear*, 131 S. Ct. at 2853 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 728 (1988)); *see also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (describing the states of "incorporation or principal place of business" as analogous to individual citizenship or domicile and "indicat[ing] general submission to a State's powers"). Under this standard, the corporate defendants in *Goodyear* were not "at home" in North Carolina because they

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[4] *See generally* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966).

were incorporated and had their principal places of business elsewhere—namely, Turkey, France, and Luxembourg. *Id.* at 2850. *See also Nicastro*, 131 S. Ct. at 2797 (Ginsburg, J., dissenting) (A foreign corporation is "not subject to general (all purpose) jurisdiction in [forum courts], for that foreign-country corporation is hardly 'at home' in [the forum]."). While their sales of goods to North Carolina might have supported specific jurisdiction in an action related to those sales, *see Goodyear*, 131 S. Ct. at 2855, they were insufficient to support general jurisdiction.

The "at home" standard announced in *Goodyear* fits comfortably with the Court's two earlier post-*Shoe* decisions addressing general jurisdiction over nonresident corporations. A quarter-century before *Goodyear*, this Court held that general jurisdiction would not lie over nonresident corporations based on their purchases from the forum state. *See Helicopteros*, 466 U.S. at 415-19. Like the non-resident defendants in *Goodyear*, the corporate defendant in *Helicopteros* was incorporated and had its principal place of business in a foreign country—Colombia. *Id.* at 409. And while its purchases from the forum state would perhaps be relevant to a specific jurisdiction claim, *see id.* at 425-26 (Brennan, J., dissenting), they were insufficient to render it "at home" in the forum (Texas) and thus could not support general jurisdiction.

In contrast to *Goodyear* and *Helicopteros*, this Court upheld an assertion of general jurisdiction in *Perkins v. Benguet Consolidated Mining Co.*, 343 U.S. 437 (1952). *Perkins* involved a shareholder's claims for nonpayment of dividends and failure to issue shares against a "sociedad anonima" organized under the laws of the Philippines and conducting mining

operations in that country. *Id.* at 439. Despite the company's foreign seat, the shareholder filed suit in Ohio where its president (who was also its general manager and principal stockholder) had relocated during the wartime hostilities in the Philippines. *Id.* at 447-48. Although the shareholder's claims were unrelated to the company's contacts with Ohio, *id.* at 447, the Court held that the Ohio court's assertion of adjudicatory jurisdiction comported with the Due Process Clause, *id.* at 448-49. The Court rested this conclusion on several facts—the company's president maintained an office there, carried on correspondence there relating to the company, maintained company bank accounts there, used an Ohio-based bank as a transfer agent, hosted board meetings, and directed corporate operations from there. *Id.* at 447-48. As this Court later explained, "[i]n those circumstances, Ohio was the corporation's *principal, if temporary, place of business.*" *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984) (emphasis added); *cf. Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (describing principal place of business for purposes of federal diversity statute as "referring to the place where a corporation's officers direct, control and coordinate the corporation's activities").

Read together, *Goodyear*, *Helicopteros*, and *Perkins* establish a clear and predictable rule: Corporations are subject to general jurisdiction only in their state of incorporation and principal place of business. *See also Nicastro*, 131 S. Ct. at 2787 (plurality opinion) ("[T]hose who live or operate primarily outside a State have a due process right not to be subject to judgment in its courts as a general matter."). This rule comports with the history underpinning the due process limits on adjudicatory jurisdiction, as ex-

plained in Section I.B. It advances the purposes underpinning those limits, as explained in Section I.C. Finally, it is supported by several additional practical considerations, discussed in Section I.D.

B. Limiting general jurisdiction to the forums where corporate defendants are "at home" comports with the history underlying the due process limitations on adjudicatory jurisdiction.

Before *International Shoe*, "[t]he foundation of jurisdiction [wa]s physical power." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). Courts authenticated their physical power over defendants by effecting proper service of process. Corporations, as initially conceived, were "artificial persons" that existed only within the territorial borders of the sovereign that created them; thus, they could not reside beyond the territorial borders of their place of incorporation. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839). Because corporations act through their agents, service was originally possible only on their principal corporate officers in their state of incorporation. Austin W. Scott, *Jurisdiction over Nonresidents Doing Business Within a State*, 32 Harv. L. Rev. 871, 878 (1919). This was because the functions and authority of corporate officers were thought to cease at the territorial border of the state of incorporation. *E.g., McQueen v. Middletown Mfg. Co.*, 16 Johns. 5, 7 (N.Y. Sup. Ct. 1819). Consequently, corporations were subject to general jurisdiction only in their state of domicile—their state of incorporation. Justice Field summarized this point in *St. Clair v. Cox*:

> Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which

> it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Chief Justice TANEY [in *Bank of Augusta v. Earle*], migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

106 U.S. 350, 354 (1882).

This restrictive view of adjudicatory authority began to wither during the late nineteenth century as interstate commerce began to bloom. Corporations, through their agents, increasingly transacted business beyond the borders of their state of incorporation. 4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1066 (3d ed. 2002). The Court, moreover, recognized that such transactions were possible only with the express or implied consent of the other state. *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855). In exchange for that consent, states could impose conditions on nonresident corporations so long as they were not "repugnant to the [C]onstitution or the laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." *Id.*, *quoted with approval in St. Clair*, 106 U.S. at 359.

As a result, both before and after the Fourteenth Amendment's ratification, states sometimes required nonresident corporations "doing business" within their borders to appoint an agent for service or deemed service proper when it was made on a designated public official or an in-state agent of the corporation. *See e.g.*, *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 605 & n.1 (1899) (discussing 1877 Tennessee statute permitting in-state service on any agent of a nonresident corporation "doing business in the state" for suits arising from its in-state business transactions); *French*, 59 U.S. at 406 (discussing 1851 Ohio statute permitting in-state service on most in-state agents of nonresident insurance corporations); *see also* Restatement (First) of Judgments § 29 & cmt. a (1942); Restatement (First) of Conflict of Laws § 91 & cmt. b (1934). These statutes aided states in asserting jurisdiction over nonresident corporations. So while they could not "reside" outside of their state of incorporation, they could be sued in another state in limited circumstances. *French*, 59 U.S. at 407.

Even during this period of expanding adjudicatory jurisdiction, a state's authority over nonresident corporations did not extend to every possible claim against them. This point was made plain in Justice Harlan's unanimous opinion in *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U.S. 8 (1907). There, the Court reiterated that states could condition a nonresident corporation's ability to transact business within their borders upon filing a statement with a state public official (in that case, an insurance commissioner) attesting that service on the public official could be treated as personal service on the nonresident corporation. *Id.* at 21. Importantly, however, should the nonresident corporation fail to do so and yet transact business within the state, its lack of

compliance would not constitute a defense but rather an implicit acceptance of the state's service statute. *Id.* at 21-22.

Yet the Court was equally clear that, under these circumstances, states did not have unlimited adjudicatory jurisdiction over nonresident corporations. Instead, their jurisdiction extended only to claims related to the corporation's business transactions within the state. *See id.* at 21 ("But even if it be assumed that the [nonresident corporation] was engaged in some business in [the forum state] at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the [public official] of that [state] would alone be sufficient to bring it into court in respect of all business transacted by it, no matter where, with, or for the benefit of, citizens of [the forum state]."). In the Court's view, public policy considerations warranted the inference that the nonresident corporation implicitly assented to the forum state's jurisdiction "as to business there transacted by it." *Id.* at 23. But "it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although the citizens of the former state may be interested in such business." *Id.* In other words, absent explicit consent, nonresident corporations could not be subject to general jurisdiction outside of their state of incorporation, no matter how much business they transacted there. *See Louisville & Nashville R.R. Co. v. Chatters*, 279 U.S. 320, 325 (1929) ("Even when present and amenable to suit [a nonresident corporation] may not, *unless it has consented*, be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction."

(emphasis added) (citations omitted)).[5] *See generally* Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. Rev. 671, 681-84 (2012).

In sum, then, the history of adjudicatory jurisdiction before *International Shoe* establishes that the Due Process Clause limited general jurisdiction over nonresident corporations, absent their prior consent, to only those forums where they were deemed to be legally "at home."

C. Limiting general jurisdiction to the forums where corporate defendants are "at home" advances the purposes underlying the due process limitations on adjudicatory jurisdiction.

The due process limits on adjudicatory jurisdiction traditionally have served "two related, but distinguishable functions." *Woodson*, 444 U.S. at 292. First, they reduce clashes among sovereign states (whether domestic or foreign). *See id.*; *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Assertions of jurisdiction over nonresident defendants necessarily implicate the interests of two sovereigns—the sovereign asserting adjudicatory jurisdiction and the sovereign where the defendant is "at home." Second,

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[5] Under the Restatement, general jurisdiction might lie where nonresident corporations explicitly consented—by filing the applicable paperwork either appointing an agent for service or assenting to service upon a public official and then expressly empowering the designated agent or public official to accept service on its behalf for any cause of action. *See* Restatement (First) of Conflict of Laws § 91 & cmt. c (1934). In no case could the state's adjudicatory jurisdiction exceed the scope of authority that the agent or official possessed to accept service. *Id.* cmt. b.

the constitutional limits avoid unfairness to the defendants. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 465 U.S. 694, 702-03 n.10 (1982). Permitting jurisdiction over corporations with a few forum contacts unrelated to the claims "lays too great and unreasonable a burden on the[m] to comport with due process." *Int'l Shoe*, 326 U.S. at 317. These twin functions influence the different doctrinal approaches governing specific and general jurisdiction.

Specific jurisdiction inquiries require a complex analysis of the competing sovereign interests and the burdens on the defendant. Consequently, specific jurisdiction entails a fact-intensive, two-step inquiry: (1) whether the defendant has undertaken "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws," *Hanson*, 357 U.S. at 253, and (2) whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice," *Int'l Shoe*, 326 U.S. at 316. *Woodson*, a specific jurisdiction case, explained that the second step of this inquiry turns on an array of factors, such as the burden on the defendant and the forum state's interest, to guide the determination whether an exercise of jurisdiction accords with "traditional notions of fair play and substantial justice." 444 U.S. at 292; *see also Asahi*, 480 U.S. at 113-16 (majority opinion) (holding, in a specific jurisdiction case, that *Woodson*'s factors do not support exercise of adjudicatory jurisdiction).

General jurisdiction inquiries look different. The balance of sovereign interests is more one-sided, and the unfairness to the defendant is more easily

assessed. Consequently, general jurisdiction rules tend to be categorical. *Goodyear*, *Helicopteros*, and *Perkins* all resolved their respective questions of adjudicatory authority without considering whether the exercise of general jurisdiction comported with "traditional notions of fair play and substantial justice." Strictly limiting general jurisdiction over corporations to the forums where they are incorporated or maintain their principal place of business avoids needless "uncertainty and litigation over the preliminary issue of the forum's competence," *Burnham v. Superior Court of Cal., Cnty. of Marin*, 495 U.S. 604, 626 (1990) (plurality opinion), and reflects the categorical approach previously employed in this Court's general jurisdiction decisions. Any assertion of general jurisdiction outside of those forums would be, as Petitioner puts it, *per se* unreasonable. *See* Brief for Petitioner at 37-38.

D. Carefully drawn limits on the forums that can assert general jurisdiction provide predictability, promote foreign commerce, and minimize interference with the foreign relations of the United States.

Goodyear's "at home" rule is not only compatible with doctrine, history, and purposes, it also is supported by several additional practical considerations.

First, the rule offers predictability for businesses and easy application for courts. "Predictability," as this Court recently explained, "is valuable to corporations making business and investment decisions." *Hertz*, 559 U.S. at 94. In the context of adjudicatory jurisdiction, clear and predictable jurisdictional rules enable companies "to structure their primary conduct with some minimum assurance as to where that

conduct will and will not render them liable to suit." *Woodson*, 444 U.S. at 297. By contrast, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz*, 559 U.S. at 94.

The benefits of a clear and predictable rule governing general jurisdiction over nonresident corporations resonate equally with foreign and domestic companies. Domestic companies, like foreign ones, routinely use subsidiaries or other juridical entities to conduct business across state lines, *see* Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder*, 107 Yale L.J. 1413, 1427 & n.76 (1998), and lower courts sometimes rely on the activities of those entities to exercise general jurisdiction over the nonresident domestic company.[6] Unfortunately, the standards employed in those cases are hardly clear. Confirming that corporations are subject to general jurisdiction only in the forums where they are incorporated and maintain their principal place of business avoids that uncertainty and unpredictability. The forum of incorporation is easily identified by reference to the company's founding documents. And although the forum where the company maintains its principal place of business might be debatable in borderline cases, this Court can develop clear standards to guide that inquiry, perhaps by reference to comparable tests in other jurisdictional contexts. *See Hertz*, 559 U.S. at 94 (explaining how the "nerve center" test for principal place of business in subject-

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[6] *See, e.g., Alderson v. S. Co.*, 747 N.E.2d 926, 944-45 (Ill. App. Ct. 2001); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-21 (2d Cir. 1967) (applying New York law).

matter jurisdiction is easily applied in mine-run cases).

Second, holding that corporations are amenable to general jurisdiction only in forums where they are "at home" has salutary effects on foreign commerce. Foreign direct investment plays a vital role in the health of the United States Economy. *See* U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* 2 (2008). Such investment "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity and support[s] American communities." Statement by President Barack Obama on the United States Commitment to Open Investment Policy (June 20, 2011).

Extraordinary assertions of jurisdiction can frustrate this commerce-promotion objective. "Overseas firms . . . could be deterred from doing business here." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164 (2008); *cf. Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434 (1979). While such concerns often are articulated in the context of prescriptive jurisdiction, the commerce-frustrating effects of the capacious approach to general adjudicatory jurisdiction exemplified by Judge Reinhardt's panel opinion are potentially far worse. Whereas prescriptive jurisdiction rules subject foreign companies to account for specific claims, general jurisdiction rules make them answerable in the forum's courts for *all* claims regardless of where they occurred. This makes the foreign company a tempting target for plaintiffs, who may simply join the foreign company in litigation as a part of an effort to obtain settlement leverage. Even if a lower court

eventually dismisses the foreign company from the case, such relief may come only after costly and burdensome jurisdictional discovery, as this case well illustrates, *see* Pet. App. 80a. Thus, as the United States Government has acknowledged, extraordinary assertions of general jurisdiction "may dissuade foreign companies from doing business in the United States thereby depriving United States consumers of the full benefits of foreign trade." Brief for the United States as *Amicus Curiae* Supporting Petitioners in Goodyear Dunlop Tires Operations, S.A. v. Brown, No. 10-76 ("*Goodyear Brief*") at 12.

The threat to foreign-commerce promotion affects domestic companies too. As the judges dissenting from rehearing en banc correctly recognized, sweeping assertions of jurisdiction over foreign companies threaten U.S. companies with retaliatory assertions by foreign courts. Pet. App. 144a. Concern about retaliation against American companies has prompted this Court to proceed cautiously when permitting the exercise of prescriptive jurisdiction over foreign companies. *See, e.g., Japan Line*, 441 U.S. at 450; *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963). Those same concerns should animate the rules governing adjudicatory jurisdiction. European officials recently revised the rules governing the adjudicatory jurisdiction of member-state courts and considered changes to the rules governing jurisdiction over companies, like those in the United States, not organized in member states. *See* Council Regulation 2012/1215, art. 6, 2012 O.J. (L351) 1, 7 (EU); Commission of the European Communities, *Green Paper on the Review of Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* at 3-4 (Apr. 21,

2009). Foreign jurisdictional rules are far less likely to reflect a hostile approach toward U.S. companies if our own rules regarding adjudicatory jurisdiction over foreign companies are similarly measured.

Third, a carefully cabined approach to general jurisdiction reduces any unintended impact on the foreign relations of the United States. Assertions of authority over foreign corporations can easily raise tensions between the United States and other nations. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). Just like assertions of prescriptive jurisdiction, assertions of adjudicatory jurisdiction carry these risks, so any analysis of the constitutional limits of that authority likewise must take into account the "[f]ederal interest in [the] Government's foreign relations policies." *Asahi*, 480 U.S. at 115 (majority opinion).

The United States' brief in *Goodyear* explained how extraordinary assertions of general jurisdiction interfered with that "federal interest." It noted that such assertions had prompted "foreign governments' objections." *Goodyear Brief* at 33. This case well illustrates that point. The German Government identified this case as exemplifying an unwarranted intrusion by a U.S. court into the activities of a German company that, in Germany's view, should be "tried in German courts." Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, at 10 & n. 3. And German courts, as Judge Reinhardt's panel opinion acknowledges, "have expressed some concern that this suit may impinge on German sovereignty." Pet.

App. 34a. Yet unless the available forums for general jurisdiction are clearly cabined, the "concern[s]" must be assessed by the Article III courts—which are not only thrust into the position of weighing them but may simply choose to reject them, as Judge Reinhardt's panel opinion did in this case, Pet. App. 34a. *Cf. McCulloch*, 372 U.S. at 19 (observing that an "ad hoc weighing of contacts" in the context of prescriptive jurisdiction "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in practice").

The United States' brief in *Goodyear* also noted that extraordinary assertions of general jurisdiction "impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Goodyear Brief* at 33. The United States presently is not a party to any bilateral or multilateral convention governing adjudicatory jurisdiction or judgment enforcement. *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 1081-85 (5th ed. 2011). Though diplomats spent the better part of the last decade trying to achieve some degree of consensus, a lack of agreement on common principles of general jurisdiction presented a central stumbling block. *See* Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DePaul L. Rev. 319, 338-39 (2002); Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Leg. F. 141, 161-63. The lower court's expansive theory of general jurisdiction based on a foreign parent's "right to control" a subsidiary simply widens the chasm between the law of the United States and the laws of its major trading partners. By contrast, limiting general jurisdiction to the state of the defendant's

domicile is a well-recognized principle of European law. *See* Council Regulation 2012/1215, art. 4. Anchoring the United States law of general jurisdiction in similar reference points facilitates "efforts to help the world's legal systems work together, in harmony, rather than at cross purposes." *Howe v. Goldcorp Invs., Inc.*, 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.); *cf. Nicastro*, 131 S. Ct. at 2803-04 (Ginsburg, J., dissenting) (comparing American and European law on adjudicatory jurisdiction).

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This extensive historical, purposive, and practical support for *Goodyear*'s rule demonstrates the wisdom in this Court's limiting assertions of general jurisdiction over corporate defendants to forums where they are incorporated or have their principal place of business. Any objection to that rule based on alleged hardships it may cause plaintiffs is unwarranted. In all cases, *specific* jurisdiction may be available to ameliorate any hardship so long as the plaintiffs' claims are sufficiently related to the defendants' forum contacts. Only when *specific* jurisdiction is not available—that is, when a plaintiff's claims arise from a defendant's purposeful contacts outside the forum state—will *Goodyear*'s *general* jurisdiction rule be implicated. Hardship objections in such cases ring especially hollow when, as in this case, the plaintiffs are not even forum residents. But even if plaintiffs were forum residents, limiting general jurisdiction to forums where the nonresident defendant is "at home" is entirely appropriate. In cases against domestic companies, the plaintiffs would have at least one, if not two, states where general jurisdiction unquestionably would lie. And while such a forum might not exist with respect to a foreign company, Congress can

attempt to craft mechanisms designed to facilitate an available forum where specific jurisdiction might otherwise be unavailable.[7] Courts should not expand general jurisdiction out of a belief that they need to fill some gap in the jurisdictional architecture designed by Congress. Those gaps do not always reflect mere legislative oversight. Instead, as Judge Friendly observed in a related context a half-century ago, jurisdictional rules "represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing [sic] resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations." *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 226 (2d Cir. 1963) (en banc). In this context, the "balancing of various considerations"—including forum availability and commerce promotion—is one that Congress, not the courts, must undertake.

II. A Parent Corporation's Right To Control A Subsidiary Does Not Supply A Basis For Equating The Two Entities For Purposes Of Adjudicatory Jurisdiction.

Even if the Court does not rely on a categorical rule cabining the forums where general jurisdiction over corporations will lie, the Ninth Circuit's decision still must be reversed. Its "agency" test is irreconcilable with this Court's prior decisions and the purposes underpinning the due process limits on adjudicatory jurisdiction.

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[7] For certain cases arising under federal law, Rule 4(k) already alters the range of contacts relevant to the jurisdictional analysis. *See* Fed. R. Civ. P. 4(k)(1)(c); 4(k)(2). Those rules are not at issue here for the simple reason that Respondent has waived any reliance on them. *See* Brief for Petitioner at 7.

A. This Court's decision in *Cannon* creates a strong presumption that parents and subsidiaries will be treated separately in any jurisdictional inquiry.

The starting point for analyzing adjudicatory jurisdiction based on the relationship between a parent and subsidiary corporation is this Court's decision in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). Decided before *International Shoe*, *Cannon* involved a simple breach of contract action brought by a North Carolina company (Cannon) against a Maine company (Cudahy Packing) in a North Carolina court. Following removal, the Maine company sought dismissal for lack of jurisdiction; service had been effected only on the agent of a third company (Cudahy of Alabama) whose entire capital stock was owned by Cudahy Packing. The Alabama-based subsidiary maintained an office in North Carolina for the purpose of marketing Cudahy products there, so the question arose whether Cudahy Packing was "doing business" or "present" in North Carolina by dint of the activities of its wholly owned subsidiary. The Court unanimously held that, under such circumstances, jurisdiction did not lie.[8] Despite

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[8] Some critics of *Cannon* have argued that the case did not even involve the constitutional limits of adjudicatory jurisdiction and cite its statement that "no question of the constitutional powers of the state, or of the federal government is directly presented." 267 U.S. at 336. That statement is better understood as referring to lack of a constitutional challenge to the state's regulatory power rather than a constitutional challenge to the state's adjudicatory power. But even if *Cannon*'s critics are correct, they cannot avoid the cases upon which *Cannon* rests its rule of corporate separateness, all of which rest firmly on constitutional principles of adjudicatory

the Maine parent company's exercise of "control both commercially and financially" over its Alabama subsidiary, "[t]he existence of the Alabama company as a distinct corporate entity [wa]s, however, in all respects observed." 267 U.S. at 335. *Cannon*'s emphasis on the observance of corporate formalities sets a high bar to deeming nonresident corporations present in a state based on the activities of their subsidiaries there.

Some have suggested that *International Shoe* superseded *Cannon*. *See* Born & Rutledge, *supra*, at 179 n.194 (collecting authorities). That argument misreads *International Shoe*. While *International Shoe* perhaps sought to replace the lexicon of "consent, presence and doing business" with one stressing "contacts," it did not magically wipe clean the constitutional slate and discard all prior decisions that, since *Pennoyer*, had charted the due process limits on the exercise of adjudicatory jurisdiction.[9] Subsequent

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jurisdiction. *See Cannon*, 267 U.S. at 336 (citing *Conley v. Mathieson Alkali Works*, 190 U.S. 406, 409-11 (1903); *Peterson v. Chi., Rock Island & Pac. Ry. Co.*, 205 U.S. 364 (1907); and *People's Tobacco Co., Ltd., v. Am. Tobacco Co.*, 246 U.S. 79, 87 (1918)).

[9] Others have suggested that this Court's decision in *United States v. Scophony Corp. of Am.*, 333 U.S. 795 (1948), superseded *Cannon*. *See* Born & Rutledge, *supra*, at 179 n.199 (collecting authorities). That argument is incorrect. *Scophony* did not concern the constitutional constraints on adjudicatory jurisdiction but instead addressed questions of venue and statutory authorization for service. *See* 333 U.S. at 804 ("We deal here with a problem of statutory construction, not one of constitutional import." (footnote omitted)). Given this Court's admonition that it does not overrule or dramatically limit prior precedents *sub silentio*, *see, e.g., Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), it would be strange to conclude that the Court overruled *Cannon* in an opinion that

decisions of this Court have relied extensively on post-*Pennoyer*/pre-*Shoe* precedents. In the area of general jurisdiction, this Court's decision in *Helicopteros* drew heavily on the pre-*Shoe* precedent in *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923), to conclude that the assertion of adjudicatory jurisdiction in that case did not comport with the limits imposed by the Due Process Clause. 466 U.S. at 417-418. And this Court's decision in *Keeton* settled any doubt specifically about *Cannon*'s continuing vitality when it cited *Cannon* for the proposition that "jurisdiction over a parent corporation does [not] automatically establish jurisdiction over a wholly owned subsidiary." 465 U.S. at 781 n.13. Thus, *Cannon* remains the seminal decision in this area.

B. Principles of individualized consideration and corporate separateness should frame the jurisdictional inquiry.

While *International Shoe* may have changed the vocabulary of the constitutional analysis, it did not alter the underlying principles. Two principles, reflected in *Cannon*, are relevant in this case.

The first is the principle of individualized consideration. This principle flows from the very nature of the Due Process Clause itself, which protects each person from "the power of a sovereign to resolve disputes through judicial process." *Nicastro*, 131 S. Ct. at 2786-87 (plurality opinion). Consistent with this principle the "unilateral activity of another party or a third person is not an appropriate consideration

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adverted to it, *see Scophony*, 333 U.S. at 813 n.23, but did not otherwise discuss it.

when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros*, 466 U.S. at 417; *see also Hanson*, 357 U.S. at 253; *Woodson*, 444 U.S. at 298; *Kulko v. Superior Ct. of Cal., City & Cnty. of S.F.*, 436 U.S. 84, 93-94 (1978). It would be "plainly unconstitutional" to rest an assertion of adjudicatory jurisdiction over a nonresident defendant based on another's contacts. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). Instead, consistent with this principle of individualized consideration, "[t]he requirements of *International Shoe* . . . must be met as to each defendant." *Id.* at 332; *see also Keeton*, 465 U.S. at 781 n.13.

The second is the principle of corporate separateness. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003); *see also Burnet v. Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities."). This principle extends to situations where parent companies own some or all of the capital stock of a subsidiary. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Treating parent and subsidiary corporations as distinct entities serves several salutary purposes by supporting, *inter alia*, the formation of capital, the extension of credit, the optimal allocation of risk, the efficient use of assets, and the compliance with local laws (such as investment and tax laws). *See Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *cf. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611, 626 (1983); *see generally* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1039-41 (1991) (describing the purposes

behind the principle of corporate separateness); James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability*, 107 Yale L.J. 1363, 1389-91 (1998) (describing the purposes of subsidiaries). To be sure, the principle of corporate separateness is not absolute and may be overridden "in the case of fraud or some other exceptional circumstances." *Dole Food*, 538 U.S. at 476; *see also Bancec*, 462 U.S. at 629; *Bestfoods*, 524 U.S. at 62. Nonetheless, such disregard of the corporate form remains the very "rare exception," not the norm. *Dole Food*, 538 U.S. at 475; *cf. Bancec*, 462 U.S. at 627; *Anderson*, 321 U.S. at 362.[10]

Taken together, these two principles—individualized consideration and corporate separateness—might

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[10] Some courts have held that because questions of adjudicatory jurisdiction are preliminary and do not determine ultimate liability, the showing necessary to disregard corporate separateness for jurisdictional purposes should be less taxing than the showing necessary to pierce the corporate veil for liability purposes. *See* Born & Rutledge, *supra*, at 184-85, 191 (collecting cases). That proposition should be rejected. Litigation is costly and burdensome, so forcing a nonresident corporation to defend itself in a foreign forum imposes costs on that corporation no less tangible or real than a liability determination. Moreover, most cases never reach a verdict, *see* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. Leg. Stud. 459 (2004), so the exercise of personal jurisdiction effectively can drive the parties' settlement leverage. Finally, a finding of jurisdiction, particularly general jurisdiction, can have a lasting impact on the nonresident company. It amounts to a determination that the company is answerable in the forum on any claim arising anywhere in the world regardless of its contacts with the forum. Thus, the standards governing the disregard of corporate separateness should be no less taxing in the context of a jurisdictional inquiry than in the context of a substantive veil-piercing inquiry.

suggest that it is never appropriate to disregard the corporate form for purposes of evaluating adjudicatory jurisdiction. *See* Lonny Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023 (2004). But this Court need not announce such a broad holding here to reverse the judgment below. Instead, it suffices if this Court identifies a set of safe-harbor factors, thereby providing courts and corporations clear guidance about the sorts of activities that will not result in treating a subsidiary's contacts as the parent's own.

Decisions of this Court, drawing on the principles of individualized consideration and corporate separateness, help to chart those safe-harbor factors. They include:

- The parent's stock ownership of the subsidiary, *see Cannon*, 267 U.S. at 335; *cf. Shaffer*, 433 U.S. at 214; *see generally* Restatement (Second) of Conflict of Laws § 52 cmt. b (1971);
- The parent's right to elect the subsidiary's directors who, in turn, select the corporate officers, *see Bestfoods*, 524 U.S. at 62; *Peterson v. Chi., Rock Island & Pac. R.R. Co.*, 205 U.S. 364, 391 (1907);
- Duplication of some or all of the directors or officers of the parent and the subsidiary, *see Bestfoods*, 524 U.S. at 62; *see generally* William M. Fletcher, *Cyclopedia of the Law of Corporations* § 8674 (rev. ed. 2012);
- The parent's role in drafting the subsidiary's by-laws, *see id.*;

- Arms-length distribution arrangements between the parent and the subsidiary, *see Cannon*, 267 U.S. at 335;
- The subsidiary's financial dependence on the parent, *see id.*

These sorts of arrangements, standing alone or in combination, do not justify treating the subsidiary's contacts as the parent's own for purposes of establishing personal jurisdiction.[11]

Measured against these safe-harbor factors, this should be an easy case. Daimler AG and its indirectly held subsidiary maintain separate directors, officers, and employees. They have separate books and records. And the companies have separate responsibility for day-to-day decisionmaking. Thus, there is simply no basis for treating the contacts of MBUSA as Daimler AG's own. *See* Brief for Petitioner at 23.

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[11] Heeding this Court's instruction on these points, numerous lower courts have declined to disregard the corporate form when presented with arrangements of this sort. *See, e.g., Rasmussen v. Gen. Motors Corp.*, 803 N.W.2d 623 (Wis. 2011) (distribution arrangement); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 363 (6th Cir. 2008) (distribution arrangement); *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 650 (8th Cir. 2003) (share ownership); *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000) (collecting cases for the proposition that stock ownership in or affiliation with a corporation, without more, does not justify the assertion of adjudicatory jurisdiction); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998) (overlapping directors and officers); *Miller v. Honda Motor Corp. Ltd.*, 779 F.2d 769 (1st Cir. 1985) (distribution arrangement with overlapping directors and officers).

Judge Reinhardt's panel opinion complicates this easy case with a sweeping "agency" test.[12] Under that test, the contacts of a subsidiary (or any other entity) can be attributed to a parent (or any other entity) wherever two conditions are met—(1) the services provided by the subsidiary are "sufficiently important" to the parent and (2) the parent has the "right to control" the subsidiary's operations. Pet. App. 23a-30a.

This test erodes any meaningful limits set by the principles of individualized consideration and corporate separateness. The emphasis on "sufficient importance" is tautological. If an activity were not sufficiently important, then no party would engage in it. The very fact that a subsidiary company (or any entity) engages in activity supplies some sign of its importance to the company. As the Ninth Circuit judges dissenting from plenary review explained, "[a]nything a corporation does through an independent contractor, subsidiary, or distribution is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." Pet. App. 140a.

The emphasis on "right to control" is similarly flawed. It turns the jurisdictional inquiry on hypothetical acts rather than a party's actual contacts contrary to this Court's clear commands. "[A]n individual's contract with an out-of-state party alone" cannot establish minimum contacts. *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 478 (1985); *cf. id.* at 479 n.22 (suggesting in dicta that an agency relation-

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[12] Judge Reinhardt's panel opinion purports to draw support for that test from various authorities under New York law. *See Frummer v. Hilton Hotels Int'l*, 281 N.Y.S.2d 41 (1967); *Wiwa v. Royal Dutch Shell Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

ship might exist for purposes of specific jurisdiction where the defendant was the "primary participan[t] in the enterprise and has *acted* purposefully in directing" the agent's activities) (emphasis added) (citation and internal quotations omitted). A "right to control," which in this case allegedly resides with the General Distribution Agreement between Daimler AG and MBUSA, J.A. 149a-215a, amounts to nothing more than the very sort of bare contract that *Burger King* held did not suffice to establish specific jurisdiction, much less general jurisdiction.

This diluted standard upsets the reasonable expectations of foreign parent companies with United States subsidiaries. Foreign companies like a German AG are organized under another country's law. *See generally* Peter Muchlinski, *The Development of German Corporate Law*, 14 German L.J. 339 (2013). Those foreign laws set forth the legal rights and responsibilities on matters of corporation governance; in some cases, those laws may affirmatively obligate the foreign parent to exercise a degree of control or oversight of its subsidiaries. *See* Born & Rutledge, *supra*, at 187; José Engrácia Antunes, *The Liability of Polycorporate Enterprises*, 13 Conn. J. Int'l L. 197, 222 (1999). The test articulated in Judge Reinhardt's panel opinion puts the discharge of those foreign legal duties on a collision course with domestic law: A company discharging its duties under foreign law may find that conduct subjects it to general jurisdiction in the United States; alternatively, the foreign company may seek to avoid general jurisdiction but only by violating the very duties imposed on it by the law of its seat. Such collision courses should be avoided in order to ensure "the potentially conflicting laws of different nations

work together in harmony." *F. Hoffman La Roche Ltd. v. Empagran S.A.*. 542 U.S. 155, 164 (2004).

Domestic companies, especially small businesses, also suffer under the "right to control" standard. The Court's jurisdictional rules must take into account not only the interests of the company in the case before it but also the needs of small domestic concerns that must operate under the same general jurisdictional standards. *Nicastro*, 131 S. Ct. at 2790 (plurality opinion); *id.* at 2794 (Breyer, J., concurring in the judgment and joined by Alito, J.). "Small businesses create most of the nation's new jobs, employ about half of the nation's private sector work force, and provide half of the nation's nonfarm, private real gross domestic product (GDP), as well as a significant share of innovations." U.S. Small Bus. Admin., Office of Advocacy, *The Small Business Economy: A Report to the President* 1 (2009). Those small businesses often will be completely owned by a single family or individual, who not only has the "right to control" the corporation but "controls" it completely. *See* Benjamin Means, *Nonmarket Values in Family Businesses*, 54 Wm. & Mary L. Rev. 1185, 1192 (2013). One could easily imagine a court applying the lax standard articulated in Judge Reinhardt's panel opinion to those individual owners of small businesses based on their right to control their company. *Cf.* Thompson, *supra*, at 1054-57 (noting that courts are more likely to pierce substantively the veil of closely held corporations with few individual shareholders). Such an approach could "force" small business owners "to choose between" abandoning a potentially lucrative market or risk subjecting themselves to assertions of judicial jurisdiction in other states. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988). "Jurisdictional rules

should avoid these costs whenever possible." *Nicastro*, 131 S. Ct. at 2790 (plurality opinion).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF RESPONDENTS

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QUESTIONS ADDRESSED BY AMICUS CURIAE

The decision below held that in the personal jurisdiction context – as in virtually every other – an agent's acts committed on its principal's behalf can be attributed to the principal. Petitioner challenges that conclusion. *Amicus* herein demonstrates that:

1. Both the current conception and original understanding of due process permit attribution of jurisdictional contacts based on agency.

2. There is not now and never has been a constitutional right to corporate separateness, and thus there is no special, constitutional immunity from agency principles where a company's agent happens to be its subsidiary.

3. In assessing whether attribution is permitted, a foreign defendant is entitled to no more (and, if anything, less) due process protection than a domestic defendant. Petitioner's claim that jurisdiction will create diplomatic or economic difficulties does not raise a constitutional issue and cannot be squared with the fact that many countries exercise jurisdiction on grounds similar to, or broader than, those at issue here.

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INTEREST OF *AMICUS CURIAE*[1]

EarthRights International (ERI) is a human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide, including abuses in which corporations are complicit.

Amicus therefore has an interest in ensuring that this Court does not create new, unwarranted constitutional limits on the scope of personal jurisdiction or a previously unrecognized constitutional right to corporate separateness, contrary to ordinary conceptions of due process, the fundamental notion that a corporation must act through agents and the understanding of the due process clauses' Framers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below found personal jurisdiction based on Petitioner's agent's extensive contacts with the forum. Thus, the panel applied the hornbook, centuries-old understanding that an agent's acts on its principal's behalf can be attributed to the principal. This sensible approach conforms to the contemporary and original understanding of the due process clauses and the practice of other nations.

Petitioners below did not dispute that its alleged agent's contacts with the forum are *sufficient* for personal jurisdiction. Pet. App. at 21a, n.11. In

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[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution to this brief. The parties have given blanket consent to the filing of *amicus* briefs, through consent letters filed with the Court.

assessing whether those contacts may properly be *attributed* to defendants on an agency theory, the Court required Plaintiffs to show (1) "that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services," or "alternatively [it would do so] through a new representative," and (2) "an element of control." *Id.* at 21a-22a (internal quotations and emphasis omitted).

This standard is tailored to personal jurisdiction. As the court noted, "[t]he purpose of examining sufficient importance is to determine whether the actions of the subsidiary can be understood as a manifestation of the parent's presence. . . a well-established basis for general jurisdiction." *Id.* at 23a (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 318 (1945)).

Petitioner claims attribution cannot be based on agency. But jurisdiction here fits comfortably within traditional notions of fairness. Attributing the contacts of an agent to the parent is consistent with the traditional principle that corporations, lacking corporeal existence, can only act through, and are responsible for the actions of, their agents. There is no constitutional bar to attributing to Petitioner the contacts of its subsidiary that conducted Petitioner's business in California.

It makes no difference that the agent here is Petitioner's subsidiary. A subsidiary is on the same footing as any other company; it can serve as a parent's agent, irrespective of whether the parent has

ignored corporate formalities such that the subsidiary is also the parent's alter-ego. Ownership does not immunize the principal from agency rules.

Even if Petitioner could show that in some contexts, the acts of a wholly-owned subsidiary that serves as its parent's agent should not be attributable to its parent based on agency, it could not show, as it must, that corporate separateness is a *constitutional right*. This Court has already rejected any such notion. *Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425 (1980). And it cannot be reconciled with the original understanding of due process, since, at the passage of the Fifth and Fourteenth Amendments, a corporation could not own another corporation. Nothing in subsequent due process jurisprudence suggests that operating a unified business as legally distinct entities has morphed from a universally prohibited act into a due process right.

Indeed, while state and federal law often recognize a parent as separate from its subsidiary, they frequently do not. Creating such a right for the first time here would threaten existing law in fields as diverse as tax, ERISA, labor and anti-trust.

Although Petitioner ignores the potentially far-reaching effects of its position, it forecasts dire consequences – a flood of litigation and the flight of foreign corporations doing business with the United States – if personal jurisdiction may be based on the contacts of a subsidiary/agent. But the standard Petitioner challenges has been used for decades, and Petitioner presents no evidence of the harms it now predicts.

International practice confirms the fairness of exercising jurisdiction based upon the contacts of agent/subsidiaries acting on the parent's behalf. The fact that other nations, including Germany, exercise similar and sometimes broader jurisdiction refutes any claim that jurisdiction is out of step with international practice or that jurisdiction will chill investment in the United States or lead other nations to "retaliate" against us.

Petitioner's "reasonableness" arguments fall largely outside the scope of this brief. Nonetheless, its erroneous notion that applying foreign or state law to claims arising abroad interferes with other nations' sovereignty and thus implicates due process has such potentially far reaching effects that we address it here.

Applying another nation's law obviously does not infringe upon that nation's sovereignty. And this Court has expressly rejected the idea that applying forum law does so. Whether forum law applies at all is a choice-of-law question. This Court should decline Petitioner's invitation to create new constitutional limits that would have unforeseeable and potentially widespread impacts on established state choice-of-law rules.

ARGUMENT

I. Agency is a proper basis for evaluating personal jurisdiction.

A. This Court has already held that the contacts of an agent may be attributed to the principal.

Agency is central to a personal jurisdiction analysis. In *International Shoe Co. v. Washington*, this Court held that, in assessing a corporation's contacts with the state, courts must consider the "activities of the corporation's agent within the state." 326 U.S. 310, 316-17 (1945). Since "the corporate personality is a fiction," a corporation's "presence" in a jurisdiction "can be manifested only by activities carried on in its behalf by those who are authorized to act for it." *Id.* at 316.

Petitioner concedes that an agent's contacts are relevant to specific jurisdiction, but claims that courts may not consider those contacts in analyzing general jurisdiction. Pet. at 24-25. There is no basis for such an artificial distinction. The above-quoted language from *International Shoe* on its face applies equally to general jurisdiction. The Court spoke in terms of "presence," which has always been the basis for general jurisdiction. And the nature of a corporation does not change according to the type of jurisdiction invoked.

Perkins v. Benguet Consol. Mining Co. confirms that *International Shoe* applies to general jurisdiction. There, this Court noted that the prior understanding of due process – which precluded state officials from accepting service over foreign corporations *in cases involving obligations arising*

outside of the forum – was "modified . . . particularly in *International Shoe*." 342 U.S. 437, 444 (1952). Indeed, *Perkins* expressly held that the appropriate considerations for general jurisdiction mirror those for specific jurisdiction detailed in *International Shoe*, *id.* at 445-46 (citing 326 U.S. at 317-20), and applied those tests to general jurisdiction. *Id.* at 446-47.

Of course, the fact that the same contacts are *relevant* to both specific and general jurisdiction does not mean that contacts *sufficient* for specific jurisdiction are necessarily so for general jurisdiction. While the former can involve "single or occasional acts," the latter requires contacts that are "continuous and systematic." *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851, 2853-54 (2011). But the types of contacts that can be *considered* do not differ by the type of jurisdiction asserted.

Consistent with the recognition in *International Shoe* that corporations must act through their agents, the *only* connection in *Perkins* between the forum and the defendant was that a corporate agent conducted corporate business in the state. The mining company at issue was foreign, and all of its operations were located in the Philippines. 342 U.S. at 439, 447. During Japan's occupation of the Philippines in the Second World War, the president of the company discharged his corporate duties from Ohio. *Id.* at 447-48. Thus, the contacts found sufficient in *Perkins* were not that the company was incorporated or located or did its mining business in Ohio, but rather that an *agent* of the company acted there on the company's behalf.

Since the company was dormant, its agent's actions constituted essentially all of the company's activity. *Id.* at 447. But *Perkins* does not suggest such exclusivity is required. *See id.* at 447-48. And, *Perkins* considered the importance to the company of the forum contacts in determining whether those contacts were *sufficient*, *see id.* at 447-48 – a question not presented here. Resp. Br. at 12. It did not find importance to be an aspect of the prior question of whether the agent's acts are *relevant* and thus may be attributed to the parent at all. 342 U.S. at 447-48. Clearly, they may.[2]

B. The law has always understood that corporations must act through agents.

Agents and agency liability are part and parcel of the entire idea of a corporation. From the beginning of our law – indeed the beginning of corporate law – it has been recognized that corporations cannot act but through agents and are responsible for their agents' acts. History therefore confirms this Court's recognition in *International Shoe* that attributing the contacts of an agent to the principal complies with "traditional notions of fair play and substantial justice," 326 U.S. at 316-17 (internal quotations omitted), and shows that doing

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[2] In any event, the court below required that the contact be "important" to the defendant in order for it to be relevant. Pet. App. at 21a-22a. The United States criticizes the panel for relying on importance, U.S. Br. at 32-33, but simultaneously claims jurisdiction should be assessed by comparing the contacts with California to those with the Petitioner's home forum, a different importance standard. *Id.* at 17. The panel's measure of importance is more than sufficient to ensure that attributing the contacts to Petitioner is not fundamentally unfair.

so is consistent with the original understanding of the due process clauses.

Corporate bodies have been recognized in law at least as far back as 533 A.D., in the Institutes of Justinian and the related Digests. Horace La Fayette Wilgus, 1 *Cases on the General Principles of the Law of Private Corporations*, 73 (1902). Even then, the law considered corporations to be "fictitious persons" that cannot act but through agents. *Id.* (discussing Digest of Justinian Vol 1. Section 3,4,1,1, and noting "the corporate body, as such, [could] sue and be sued, receive or part with property, bind itself or bind others, *through some agent or syndic who acts in the name of the whole*, just as any individual might act for himself" (emphasis added)).

That conception continued, such that over a thousand years later, Lord Coke, in his seminal opinion in the *Case of Sutton's Hospital,* noted that a corporation "is invisible, immortal, and rests only in intendment and consideration of law." (1613, K. B.) 10 Co. Rep. 1a at p. 32b; *see also* William Blackstone, I Commentaries on the Laws of England 476-77 (1765); W. S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 Yale L. J. 382, 387 (1922). Our law adopted that understanding. Thus, *Trs. of Dartmouth College v. Woodward* echoes Coke and Blackstone: "[A] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." 17 U.S. (4 Wheat.) 518, 636 (1819).

Although corporations are artificial legal persons, courts "have always been prepared to hold that a corporation is as capable of being held liable as a natural person." Holdsworth, *English Corporation*

Law at 388. And consistent with the law going back to Justinian, it was understood at the time the due process clauses were adopted that corporations could not act directly, but instead act through agents. *See e.g., Randel v. President, Directors & Co. of Chesapeake & Delaware Canal*, 1 Del. (1 Harr.) 233, 271 (1833) ("[A] corporation, cannot act of itself, but must act through its agents."); *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 25 N.J.L. 57, 60-61 (N.J. Sup. Ct. 1855) ("[A]corporation acts nowhere, except by its officers and agents.").

Because corporate acts occur through agents, the corporation was held responsible under agency principles.[3] Thus, in the early case of *Gray v. President*, Judge Sedgwick noted that the principle that masters are responsible for the acts of their agents while acting under the authority delegated to them "has been so frequently recognized" that citation to authorities was "superfluous." 3 Mass. 364, 385 (1807). Further noting that "in innumerable instances, [corporations] cannot act but by their agents," he concluded that "[i]n no case is th[e] principle [of agency liability] of so much importance as in the relation of corporations to their servants." *Id.*

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[3] *See e.g., Chestnut Hill Springhouse Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) (corporation liable for its servants' trespass because corporation is responsible in the same manner as an individual for agent's acts); *Moore v. Fitchburg R. Corp.*, 70 Mass. 465, 465 (1855) (railroad corporation liable for assault and battery by officer); *see also* J. Grant, *A practical treatise on the law of corporations in general*, 278 (1854) (noting that corporation is liable for the tortious act of agent done in the course of ordinary service).

C. Courts have long asserted jurisdiction over corporations based on agency.

As the activities of corporations began to cross state lines through the actions of their agents, courts responded by recognizing that a corporation could manifest its presence in another state through the acts of its agents doing business on its behalf.

"[T]he fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168-170 (1939).

By 1856, this Court held that although a corporation "existing only by virtue of a law" of one state "cannot be deemed to pass personally beyond the limits of that state. . . it does not necessarily follow that a valid judgment could be recovered against it only in that State." *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407 (1856); *see also R.R. Co. v. Koontz*, 104 U.S. 5, 10 (1881) (holding Maryland company was properly sued in Virginia for doing business through a franchise there, noting it is "well settled" that a corporation of one State doing business in another can be sued where its business is done) (collecting authorities); *R.R. Co. v. Harris*, 79 U.S. 65, 83-84 (1871) (jurisdiction in District of Columbia proper in suit against Maryland corporation on cause of action arising in Virginia).

Thus, in *Barrow S.S. Co. v. Kane*, this Court held that a New York federal court properly exercised jurisdiction over a British corporation sued by a New Jersey resident for a tort in Ireland. 170 U.S. 100 (1898). The Court explained that "a corporation of one

state, lawfully doing business in another state, and summoned in an action in the latter state by service upon its principal officer therein, is subject to the jurisdiction of the court in which the action is brought," even when the cause of action arose in another jurisdiction. *Id.* at 109. The defendant company was deemed to have been doing business through a firm that acted as its "general agents therein, managing the affairs of the said company within said city." *Id.* at 101, 105.[4]

Recognizing that the powers of corporations are "world wide" and that "for all practical purposes [corporations] may exist and act everywhere," the court in *Moulin* similarly found that although corporations were the creatures of the states in which they were incorporated, this "principle would not be held to apply to a corporation which did not confine its business within the state by which it was chartered." 25 N.J.L. at 60. Accordingly, the court held that a corporation that transacts business through agents in a foreign jurisdiction may be sued in that jurisdiction. *Id.*

In sum, although corporations were considered to be creatures of the states in which they were chartered or incorporated, courts understood that corporations could and did conduct business outside of those states through agents. Liability or jurisdiction could be found on that basis.

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[4] Although the firm was the defendant's agent for purposes of conducting its steamship business, it was not designated as defendant's agent for service of process. *See id.* at 104.

Given that agency is an ordinary means of attribution, and in light of the history and nature of corporations, such attribution does not offend fundamental notions of fairness or due process, nor does it create unpredictability for corporations and investors.

II. Corporate parents have no special, let alone constitutional, immunity from agency principles.

According to Petitioner, courts may attribute the contacts of a subsidiary to the parent based *only* on veil-piercing, and cannot do so where the subsidiary is the parent's agent. Pet. Br. at 11-12, 24. Petitioner argues that "corporate separateness is deeply rooted in American law and business." *Id.* at 11. But while that is true as far as it goes, it does not go nearly far enough. Petitioner's argument also requires that the Court accept two additional propositions, both of which are wrong.

First, Petitioners must show that corporate separateness overcomes the "deeply rooted" principle that a corporation acts through agents and that those acts are attributable to the company. But the agency principle is, if anything, more firmly entrenched than any protection for corporate separateness. *See* Section I.B., *supra*; Section II.B., *infra*; U.S. Br. at 21 (noting that at passage of Fourteenth Amendment, limited liability was not established in substantive law) (collecting authorities); *accord* Resp. Br. at 33-34.[5]

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[5] *See generally Meyer v. Holley*, 537 U.S. 280, 285 (2003) (holding that "[i]t is well established" that traditional vicarious liability rules make principals liable for acts of their agents in the scope of their authority).

More importantly, corporate separateness does not trump agency; agency principles apply even when the agent is a subsidiary.

Second, Petitioner's burden here is to demonstrate not just a principle of American law, but a *constitutional right*. This Court, however, has already rejected the claim that there is a due process right to corporate separateness. Indeed, at the time of the framing of the due process clauses, corporations were not allowed to own other corporations.

Thus, there is no warrant for this Court to pick one "deeply-rooted" doctrine (corporate separateness), find, contrary to existing attribution principles, that it excludes another, equally "deeply-rooted" doctrine (agency), and then elevate the first principle and the new exclusion rule into a never-before-recognized constitutional right.

A. Agency is distinct from alter-ego; notions of corporate separateness do not immunize parents from attribution of their agents' acts.

Even assuming for the moment that there is a constitutional right to corporate separateness, it would not preclude attribution based on agency. Agency and alter-ego are two separate doctrines. Just as a corporation can be an agent of another, unrelated corporation, so too can a subsidiary can be the agent of its parent, even if they are not alter-egos. *E.g. Royal Indus. v. Kraft Foods*, 926 F. Supp. 407, 412-13 (S.D.N.Y. 1996); *Joiner v. Ryder Sys. Inc.*, 966 F. Supp. 1478, 1487 n.19 (C.D. Ill. 1996); *Kissun v. Humana, Inc.*, 479 S.E.2d 751, 753 (Ga. 1997); *Northern Natural Gas Co. v. Superior Court*, 64 Cal. App. 3d 983, 994

(1976). The subsidiary/agent's actions are attributed to the principal as in any other agency relationship; the parent/principal cannot escape attribution just because it owns its agent's stock. *E.g. Royal Indus.*, 926 F. Supp. at 412-13 (citing Restatement (Second) of Agency §14M & Appendix, Reporter's Notes at 68 (1958) (distinguishing liability imposed on parent because of the existence of an agency relationship from cases in which the corporate veil of the subsidiary is pierced)).

Petitioner's proposed right to corporate separateness would not implicate agency in any event because, unlike veil-piercing, agency does not treat the parent and the principal as a single entity; rather agency preserves the subsidiary's separate existence. *E.g. Northern Natural Gas Co.*, 64 Cal. App. 3d at 994. An agent, subsidiary or not, is a separate entity acting on the principal's behalf.

Petitioner's claim that ownership somehow immunizes it from ordinary agency principles defies not only this established law, but common-sense. To be sure, mere ownership standing alone is insufficient for attribution. But where a corporation wholly owns its agent, there is an additional tie between the two beyond agency, and thus, if anything, even more reason to find the agent's contacts attributable to the principal. It is a strange arithmetic that Petitioner posits, wherein one plus one equals zero.

B. There is no constitutional right to corporate separateness.

Corporations owning other corporations that carry on their business may be treated as a single entity for due process purposes, even if the subsidiary

is not the parent's alter-ego. This Court has so held in the taxation context. *Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425 (1980); *see* Resp. Br. at 25-26. And such treatment fully accords with the understanding of corporate personality at the time of the passage of both the Fifth and Fourteenth Amendments, when corporations were not allowed to own other corporations. It is also consistent with the fact that federal and state law often refuse to treat parents as distinct from their subsidiaries.

A corporation's decision to separately incorporate a subsidiary may have any number of legal implications, but it simply does not create a constitutional requirement that the two entities be treated as separate.

1. This Court has rejected the notion that due process requires separate treatment.

In *Mobil Oil*, this Court considered Vermont's tax on companies doing business within the state, based upon a share of their total income earned inside or outside the state that was proportional to the business conducted in-state. 445 U.S. at 429. According to Mobil, due process required that dividends from a "foreign source" – subsidiaries that were not incorporated in, did no business in and were not managed from Vermont – must be excluded from the calculation of total income because they lacked a sufficient nexus to Mobil's business in Vermont. *Id.* at 428, 434, 437. This Court however, found there was no due process problem because, irrespective of corporate formalities, Vermont's tax treated a

"functionally integrated enterprise" as a unitary business based on economic realities. *Id.* at 440-41.

Mobil Oil therefore refutes Petitioner's claim that corporate separateness is a constitutional right. Pet. Br. at 20-21. Indeed, it shows that the "sufficiently important" test is permitted by the due process clause, since functional integration and economic realities are the essence of that test.[6]

2. Federal and state law often treat corporations and their subsidiaries as single entities irrespective of whether they are alter-egos.

The tax regime in *Mobil Oil* was hardly unique in treating the corporation and its subsidiaries as one entity. The "sufficiently important" test is fully consistent with the fact that both the federal government and the states often attribute the conduct of subsidiaries to parents without requiring alter-ego. That such an approach is common surely suggests that it is not barred by due process concerns.

Instances abound in which the law attributes the subsidiary's acts to the parent on grounds less rigid than veil-piercing. *See* Resp. Br. at 32-33; U.S. Br. at 26 & n. 8. Thus, corporate groups have been treated as single enterprises for the purpose of

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[6] In *Goodyear*, this Court declined to address the argument that jurisdiction could be based on a showing that a corporation managed its subsidiaries as a "unitary enterprise." 131 S. Ct. at 2857. *Goodyear* held only that the foreign subsidiaries of a domestic parent are not subject to general jurisdiction when their products were sold occasionally within North Carolina through no affirmative action of their own. *Id.* at 2851.

attributing civil liability or other obligations. The Employee Retirement Income Security Act of 1974, (ERISA), for example, holds corporate parents liable for the termination benefits that wholly-owned subsidiaries are required to pay if they discontinue their participation in retirement income plans; courts have found no problem with Congress abrogating veil-piercing requirements in this context. *See Pension Ben. Guar. Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1093 (1st Cir. 1983). The National Labor Relations Act similarly requires a corporation to engage in collective bargaining even if the petitioners are employed by a subsidiary, if the nominally separate entities are an "integrated enterprise," as determined by indicia of control and common management. *Radio & Television Broadcast Technicians Local Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965) (per curiam).

In anti-trust law, parents and wholly-owned subsidiaries are deemed to have "unity of purpose or a common design"; it would be absurd to speak of a parent and a subsidiary entering into conspiracy, as this would be tantamount to conspiring with oneself. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984); *see also* Resp. Br. at 32-33.

Likewise, several states' courts have consistently found that the actions, obligations, and debts of companies within a group that are functionally operated as a single enterprise may be attributed to each other without piercing the veil. *See* Meredith Dearborn, Comment, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 Calif. L. Rev. 195, 243-45 (2009) (collecting cases).

A holding that the Constitution requires separate treatment would conflict with, and could call into question the validity of, all of these laws.

3. The Ninth Circuit's test is true to the original understanding of the due process clauses.

When the Fifth and Fourteenth Amendments were passed, a corporation could not separately incorporate a subsidiary. Thus, this Court's recognition in *Mobil Oil* that there is no constitutional right to separate treatment fully accords with the original understanding of the due process clauses.

So too does the test applied below: asking whether a service is "sufficiently important" that, absent the agent, the defendant would have to perform it itself answers the question of whether, at the time of the passage of the due process amendments, the corporation – unable to incorporate a subsidiary – would have conducted the activity through a single entity.

At the Founding, corporations were rare, and were almost exclusively municipal; business corporations were largely nonexistent.[7] For many years thereafter, "the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable." *Liggett Co. v. Lee,* 288 U.S. 517, 547-49 (1933) (Brandeis, J., dissenting in part).

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[7] The "archetypal" corporation was the municipality; as of 1780 there were only seven business corporations, and as of 1790 just forty. M. Horwitz, *The Transformation of American Law 1780-1860*, 112 (Harvard University Press, 1977).

Until the Nineteenth Century, every incorporation required a special act of the state legislature. *See* David Millon, *Theories of the Corporation*, 1990 Duke L. J. 201, 206 (Apr. 1990). And "incorporation for business was commonly denied long after it had been freely granted for religious, educational, and charitable purposes." *Liggett*, 288 U.S. at 548-49 (Brandeis, J., dissenting in part). General incorporation statutes gradually replaced special charters, but permission to incorporate for "any lawful purpose," did not become the norm until 1870. *Id.* at 554-56 (Brandeis, J., dissenting in part); Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 Del. J. Corp. L. 283, 293 n.19 (1990). And even as this shift occurred, general incorporation laws "long embodied severe restrictions upon size and upon the scope of corporate activity," *Liggett,* 288 U.S. at 549 (Brandeis, J., dissenting in part); in particular, by prohibiting ownership of stock of other corporations. Millon, *Theories of the Corporation* at 209; Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of William Hursts's Study of Corporations,* 49 Am. U. L. Rev. 81, 106-07 (1999).

Until the end of the Nineteenth Century, corporations, with limited exceptions, could not own or hold stock in other corporations. *Liggett Co.,* 288 U.S. at 556 (Brandeis, J., dissenting in part). Only the simple, single entity corporate structure was permitted; the parent-subsidiary relationship was essentially non-existent. *See* Phillip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups,* 37 Conn. L. Rev. 605, 607 (2005); E. Merrick Dodd, Jr., *Statutory Developments*

in Business Corporation Law, 1886-1936, 50 Harv. L. Rev. 27, 29-30 (1936); *see also* U.S. Br. at 21 ("when the Fourteenth Amendment was ratified in 1868, the fact pattern of a parent-subsidiary relationship was rarely if ever observed"; "neither parent-subsidiary holding companies nor other intercorporate arrangements could exist anywhere in the nation").

Thus, it was uniformly recognized that corporations could not hold the stock of other corporations without express statutory authority to do so. *See e.g. De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.,* 175 U.S. 40, 54-55 (1899) (collecting cases); *People ex rel. Peabody v. Chicago Gas Trust Co.,* 130 Ill. 268, 284-85 (1889) (collecting authorities); *see also* Fred Freedland, *History of Holding Company Legislation in New York State: Some Doubts As to the "New Jersey First" Tradition,* 24 Fordham L. Rev. 369, 369 (1955) (noting "authority for such corporate activity is and always has been ultimately based upon positive legislative action" and "it has been uniformly held that a business corporation has no inherent authority to hold the stock of another business corporation, even if ... engaged in exactly the same type of business venture").

A number of states, such as New York, had laws expressly *prohibiting* intercorporate stock ownership. *Liggett,* 288 US at 556 n. 32 (Brandeis, J., dissenting in part) (citing N.Y. Laws 1848, c. 40, s 8; 1876, c. 358; 1890, c. 564, s 40; 1890, c. 567, s 12); *De La Vergne Refrigerating Mach. Co.,* 175 U.S. at 55; Dearborn, *Enterprise Liability,* at 203 n. 44 (citing Act of 3.22.1811, ch. 67, sec. 7 (N.Y. Laws 111)); Resp.

Br. at 34.[8] In states without express prohibitions, intercorporate ownership was "unanimously prohibited by the courts[.]" Dearborn, *Enterprise Liability,* at 203 n. 44; *Liggett Co.*, 288 U.S. at 556 (Brandeis, J., dissenting in part) ("the holding company was impossible"). Intercorporate stockholding was generally deemed contrary to public policy. *See e.g. Kappers v. Cast Stone Const. Co.,* 184 Wis. 627, 200 N.W. 376, 378-79 (1924); *Texas Utilities Co. v. Story,* 85 S.W.2d 809, 812 (Tex. Civ. App. 1935) (same).

It was not until 1888 – well after the passage of the Fourteenth Amendment – that any state expressly allowed companies organized under its general incorporation laws to acquire and hold stock of other corporations. *Liggett*, 288 US at 556 n. 32 (Brandeis, J., dissenting in part); Dodd, *Statutory Developments,* at 29-30 n.7 (1936).[9]

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[8] Like other states, New York specifically prohibited intercorporate stockholding, "except where the stock held was that of a corporation supplying necessary materials to the purchasing corporation, or where it was taken as security for, or in satisfaction of, an antecedent debt." *Liggett*, 288 U.S. at 556 n. 32 (Brandeis, J., dissenting in part) (citing N.Y. Laws 1848, c. 40, s 8; 1876, c. 358; 1890, c. 564, s 40; 1890, c. 567, s 12.").

[9] New York briefly permitted limited exceptions for insurance companies prior to this time, but the power was granted and subsequently revoked or otherwise restricted on more than one occasion. *See* Freedland, *Holding Company Legislation* at 373-75 & nn. 12, 13, 15, 16. New Jersey enacted a statute concerning intercorporate stock ownership in 1888, but it appeared limited to the ownership of stock in other New Jersey corporations. *See* Nelson Ferebee Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, 76 N.C. L. Rev. 687, 749-50 (1998). For this reason, most authorities cite the New Jersey statute of 1893, which

Given this nearly uniform position that intercorporate stockholding was impermissible and against public policy, the due process amendments could not have been contemporaneously understood to create a right to corporate separateness.

4. The ability to incorporate, including the ability to incorporate a subsidiary, remains a question of state law, not due process.

When states allowed corporations to own other corporations, they merely changed their law. They did not somehow create a constitutional right to intercorporate ownership and legal separateness, nor has any such right arisen in the interim.

Corporations are the creation of states, possessing only such rights as were expressly granted. Section I.B., *supra*; *De La Vergne Refrigerating Mach. Co.*, 175 U.S. at 54-55 (collecting cases). "Whether the corporate privilege shall be granted or withheld is always a matter of state policy." *Liggett Co.*, 288 U.S. at 545 (Brandeis, J., dissenting in part); *see also e.g. Clark v. Memphis St. Ry. Co.*, 123 Tenn. 232, 130 S.W. 751, 753-57 (1910) (holding that whether an out-of-state corporation could own stock was a question of state law).

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provided "virtually unlimited authorization to own and vote stock of other corporations both domestic and foreign." *Id.* Although New Jersey is widely credited with being the first state to generally allow this power, New York seems to have provided similar authority in 1892. *See e.g. Burrows v. Interborough Metro. Co.*, 156 F. 389, 393 (C.C.S.D.N.Y. 1907); Freedland, *Holding Company Legislation*, at 372.

Just as the legalization of intercorporate stock ownership was a product of state law, as of the mid-Twentieth Century "[i]t [wa]s the well settled rule in virtually every jurisdiction that the power of intercorporate stockholding is derived exclusively from an express or implied legislative grant." Freedland, *History of Holding Company,* at 369, n. 1, 370. And that is where the continued authority for such activity remains. *See generally CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (holding no corporate law principle is more firmly established than a State's authority to regulate domestic corporations). States retain the power to change their laws.

Indeed, "no corporation has a constitutional right to be a corporation," *Braeburn Sec. Corp. v. Smith,* 15 Ill. 2d 55, 65 (1958), let alone a constitutional right to a particular organizational structure. *See* U.S. Br. at 22 ("[A]ny attempt to constitutionalize fixed rules about the separation or unity of a juridical entity and its owners or managers would deprive legislatures of the latitude to shape the characteristics of the juridical forms they authorize.").

There is a "distinction between the status of the corporation as a separate juridical unit and the various rights— constitutional and otherwise— accorded to it by the law." Blumberg, *The Corporate Entity,* 375 n.170. This is so because:

> [t]o insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes, . . . is to make of . . . corporate personality . . . a master rather than a servant, and to decide legal

> questions on irrelevant considerations without inquiry into their merits. Issues do not properly turn upon a name.

Id. (quoting Bryant Smith, *Legal Personality,* 37 Yale L.J. 283, 298 (1928)).

There has never been a constitutional right to incorporation or to the separate incorporation of a subsidiary, and this Court should not create one now.

III. The fact that Petitioner is foreign, and Petitioner's speculation regarding the alleged policy implications of asserting jurisdiction over a foreign entity, do not counsel in favor of creating a new constitutional right.

A. Petitioner's foreign incorporation is irrelevant to whether due process permits attribution based on agency.

Petitioner relies heavily on the fact that it is a foreign corporation. *E.g.* Pet. Br. at 2, 3, 13, 34-37. That is irrelevant to the constitutional question of whether attribution based on agency is permitted, because the same question arises where the defendant is a domestic corporation. *See* Resp. Br. at 19-20. Certainly, there can be no claim that foreign defendants are entitled to *more* due process protection than domestic defendants.

On the contrary, the fact that defendant is foreign raises the issue of whether it has any due process rights at all. "[A]lthough courts often assume the minimum contacts test applies in suits against foreign 'persons,' that assumption appears never to have been challenged" and is "far from obvious" given that aliens outside the U.S. do not receive due process

protections. *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 302 , n.** (D.C. Cir. 2005) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)); *accord GSS Group Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 819 (D.C. Cir. 2012) (Williams, J., concurring) (Judges Williams and Randolph noting that "it may be valuable for courts to reconsider [] the merits of the assumption . . . that private foreign corporations deserve due process [personal jurisdiction] protections").

This Court, of course, need not resolve that issue here. But the fact that *any* due process protection for foreign corporations is itself something of an anomaly further suggests that foreign corporations are not entitled to *stricter* constitutional attribution rules than domestic defendants, and that general rules that apply equally to domestic defendants should not be crafted to account for claims specific to foreign defendants.

B. Petitioner's claims of dire consequences are irrelevant and unsupported.

Petitioner speculates that the test applied below will cause everything from "a proliferation of suits against foreign defendants" to companies "limit[ing] or end[ing] their commercial ties to the United States." Pet. Br. at 13, 34-37; *see also* U.S. Br. at 2. As Respondents point out, these are properly considerations for Congress, not for this Court in determining the meaning of the Constitution. Resp. Br. at 30-31.

Regardless, Petitioner's predictions are no substitute for evidence. The "sufficiently important"

test has been recognized by the court below for over 35 years, *see Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 423 (9th Cir. 1977), and by the Second Circuit for a decade more. *See Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967). If this standard were going to open the courts to a flood of litigation, or if foreign companies were going to decline to invest, that would have long since become apparent. Yet Petitioner provides no evidence that foreign companies have limited their economic contacts with, for example, New York or California. Nor can they show any torrent of cases; their claim that the test applied below can be met in virtually every case is demonstrably false. Pet. Br. at 13. Courts applying that standard have had no difficulty finding jurisdiction to be factually unwarranted. *See e.g. Doe v. Unocal Corp.*, 248 F.3d 915, 928-931 (9th Cir. 2001); *Focht v. Sol Melia S.A.*, 2012 U.S. Dist. LEXIS 5930 at **33-34 (N.D. Cal. Jan. 19, 2012); *In re W. States Wholesale Natural Gas Antitrust Litig.*, MDL 1566, 2009 U.S. Dist. LEXIS 14183 at **35-41 (D. Nev. Feb. 23, 2009).

C. Other nations' courts exercise jurisdiction on similar and broader grounds than the contacts of agent/subsidiaries acting on the parent's behalf.

Petitioner's claim that the jurisdiction asserted here is out of step with that exercised by other nations is simply wrong. Pet. Br. at 36. International practice makes clear that the attribution of a subsidiary-agent's contacts to a parent is well within the range of permissible options for asserting personal jurisdiction. Many nations have personal

jurisdiction regimes that easily encompass – and in a number of cases go far beyond – the agency test applied below.

Some countries attribute all subsidiaries' contacts to their parents – regardless of agency. Others attribute the contacts of managers or representatives to the parents. A number attribute *plaintiffs'* contacts to the defendant, assuming that the identity and nationality of a plaintiff is sufficient to put a defendant on notice that he may be haled into the courts of that plaintiff's country. And Petitioner's home jurisdiction of Germany, among others, allows courts to hear cases against foreigners based on the presence of any property, where the defendant's connection to Germany is significantly weaker than the employment of important subsidiaries as functional agents.

Significantly, many of these countries – including Germany – are members of the European Union, and are thus bound by the Brussels I Regulation, which requires member states to apply fairly restrictive jurisdictional rules to defendants domiciled in other member states, but leaves them free to apply their own traditional civil procedure rules as against defendants based in non-European countries. Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 4, art. 4. Petitioner cites the rules governing member-state defendants, Pet. Br. at 36, but ignores the rules those nations apply to everyone else, including the United States.

General jurisdiction based on presence of subsidiary, representative, or manager.

A number of countries automatically provide for plenary jurisdiction over foreign parent companies, simply by virtue of the existence of a domestic subsidiary, agent, representative, or manager. *See* C.P.C. art. 86.2 (Portugal) (". . . but an action against . . . foreign companies that have a branch, agency, subsidiary, delegation, or representative in Portugal may be brought in the court where the latter are based . . ."); C.P.C. art. 88 (Brazil) ("The judicial authority of Brazil is competent when 1) the defendant, regardless of its nationality, is domiciled in Brazil . . . For the purposes of paragraph 1, a foreign juridical person that has an agency, branch, or subsidiary here is considered to be domiciled in Brazil."); Minsohō, art. 3-2, para. 3 (Japan) ("With regard to actions against corporations, associations, foundations, or other entities . . . if there is no business office or its location is unknown, [the court has jurisdiction] if a representative or responsible person is domiciled in Japan.");[10] Lov om rettens pleje [Administration of Justice Act] art. 238 ¶ 1 (Denmark) ("Companies, associations, private institutions and other organizations that may be a party to legal proceedings [may be sued in] the home court of the district where the head office is situated,

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[10] Both Japan and Brazil also prescribe something akin to specific jurisdiction over cases involving the activities of branches or business offices of foreign corporations, and for foreign persons doing business in Japan, for contractual obligations incurred, *see* Minsohō, art. 3-3, paras. 4 & 5; C.P.C. art. 100 – IV(a) (Braz.), but these more restrictive provisions do not appear to limit general jurisdiction based on the address of the subsidiary or representative.

or, if not feasible, in the place where one of the administrative or management members reside.").[11]

These nations all provide jurisdiction based on rules less stringent than that applied here. This belies Petitioner's speculation that failing to limit our own jurisdictional rules would spark some sort of retaliatory jurisdiction legislation.

General jurisdiction based on domicile or residence of plaintiff.

Other countries attribute the contacts of a completely different person – the plaintiff – to the defendant for the purposes of personal jurisdiction. In these countries, resident or citizen plaintiffs have an innate right to sue in local courts in *any* tort case – even one where the defendant is foreign and the injury took place abroad. The very fact of injury to a person is deemed sufficient notice to the defendant that he may be haled into the victim's local courts. *See e.g.*, C. CIV. art. 14 (France) ("A foreigner, even if not resident in France . . . can be brought before the French courts for obligations contracted in foreign countries in favor of French persons.");[12] C. CIV. art. 14 (Luxemburg) (same); Civilprocesa likums [Law on Civil Procedure] art. 28(4) (Latvia) (tort action for personal injury or death "may also be made according

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[11] This provision applies equally in cases where the defendant is foreign as where it is simply based in a separate district within Denmark. *Id.* art, 246 ¶ 1.

[12] The French Court of Cassation has ruled that this provision applies equally to non-contractual matters, including torts. *See* Cass. 1e civ., May 27, 1970, Rev. Crit. 1971, 113, note Battifol (noting that "article 14 . . . has a general scope" and "applies notably to all litigation based in extra-contractual liability.").

to the place of residence of the plaintiff or the location where the delicts were inflicted"); Civilinio proceso kodeksas [Civil Code] arts. 30(5) & (6) (Lithuania) (claims for injury to person or property may be brought in place of plaintiff's residence); КОДЕКС НА МЕЖДУНАРОДНОТО ЧАСТНО ПРАВО [Kodeks mezhdunarodnoto chastno prabo] [Private International Law Code] art. 4(1) & ¶ 2 (Bulgaria) ("[C]ourts and other authorities shall have international jurisdiction where: . . . the claimant or applicant is a Bulgarian national or is a legal person registered in . . . Bulgaria.").

General jurisdiction based on presence of assets in the jurisdiction.

Another group of countries authorizes general jurisdiction over defendants who have *any* property whatsoever within the country – most notably Germany, the Petitioner's home jurisdiction. *See* Zivilprozessordung [ZPO] [Code of Civil Procedure], Jan. 30, 1877, § 23 (F.R.G.). Germany's courts have required a modest "further domestic connection" with the lawsuit, which has been found to be satisfied when the defendant operates a branch on German territory, *see* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 1990, Neue Juristische Wochenschrift [NJW] 423, or when the plaintiff merely has an address in Germany. *See* BGH, Dec. 13, 2012, III ZR 282/11 ¶ 16. Petitioner's claim (and the United States' suggestion) that Germany would not assert jurisdiction in a case reciprocal to this one therefore rings hollow. Pet. Br. at 36-37; U.S. Br. at 17. Assuming that Daimler has any assets in the United States – which it almost certainly does, even excluding its ownership of its California subsidiary –

its connections to Chrysler, its listing on U.S. exchanges, and the large-scale sale of its cars in California would easily meet the requirement of the "further domestic connection."

Austria has a similar asset-based jurisdictional provision, *see* Jurisdiktionsnorm [JN] [Courts Jurisdiction Act], Reichsgesetzblatt [RGBl] No. 1895/111 (Austria), which has been interpreted by Austrian courts to be bounded only by the outer limits of international law. *See* Oberster Gerichtshof [OGH] [Supreme Court] Nov. 7, 2002, 6 Ob 174/02k. Other countries allow plenary asset-based jurisdiction with no further connection between the subject matter of the lawsuit and the property in question. *See* Civilinio proceso kodeksas [Civil Code] art. 30(2) (Lithuania) (establishing that suit against non-resident "may be brought according to the location of its property or the last known place of residence in the Republic of Lithuania."); Civil Jurisdiction and Judgment Act, 1982, c. 27, § 2(g), sched. 8 (Scotland) (establishing that a person not domiciled in the United Kingdom may be sued "in the courts for any place where— (i) any movable property belonging to him has been arrested; or (ii) any immovable property in which he has any beneficial interest is situated").

* * *

Seen through this lens of multinational practice, it is clear that attributing the contacts of agent/subsidiaries to parents under the standard at issue here is well within internationally accepted bounds. There is no evidence that standard unsettles expectations, creates unpredictability, or impinges on fundamental notions of fair play.

D. This case does not intrude upon other nations' sovereignty.

In asserting that jurisdiction would be unreasonable, Petitioner argues that because Respondents have pled claims under both foreign and California law, this case has the potential to invade Argentine and German sovereignty. Pet. Br. at 38, 40. It is mistaken.

Petitioner's claim that applying foreign law raises the "obvious probability of incompatibility" with foreign law makes no sense. Pet. Br. at 38 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct 2869, 2885 (2010) (internal quotations omitted). Indeed, the quoted passage from *Morrison* is about applying U.S. statutory law, not foreign law. 130 S.Ct at 2885. Federal and state courts apply foreign law all the time. Virtually every state has choice-of-law rules that sometimes point to foreign law, federal courts sitting in diversity look to those choice-of-law rules, *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), and Federal Rule of Civil Procedure 44.1 details the procedure for determining the foreign law to be applied. U.S. courts are perfectly capable of applying foreign law without contradicting it.

Petitioner's objection to applying California law is similarly misplaced. There has been no finding that California law applies. That is a choice-of-law question, and Petitioner's argument is properly addressed through that framework, not due process. Resp. Br. at 57 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

Amicus takes no position on whether, and does not suggest that, California law would apply here.

But if a choice-of-law analysis ultimately pointed to forum law, this Court has already rejected any notion that this intrudes upon foreign sovereignty:

> If a transaction takes place in one jurisdiction and the forum is in another, the forum does not . . . by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely. . . makes applicable its own law to parties or property before it.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964).[13]

There is every reason not to place new constitutional limits on ordinary choice-of-law rules. Forty states and the District of Columbia have abandoned the *lex loci delecti* approach in favor of more modern doctrines, and thus have choice-of-law rules that direct courts hearing cases involving foreign conduct to apply forum law under at least some circumstances. Lea Brilmayer & Jack Goldsmith, *Conflict of Laws: Cases and Materials* 12, 21 (5th ed. 2002). Petitioner's suggestion that due process bars courts from applying forum law to harms arising abroad might limit all of those rules. Regardless, if this Court were inclined to consider a

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[13] The cases Petitioner cites are inapposite. Pet. Br. at 38, 40. These cases applied canons of construction to federal statutes, *Morrison*, 130 S.Ct at 2885; *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), or principles underlying such a canon to a federal common law claim. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). None purport to displace the choice-of-law analysis applied to ordinary common law claims or to establish a constitutional norm.

constitutional rule that could have such sweeping effects on settled choice-of-law understandings, it should do so in a case that, unlike this one, raises the issue directly.

CONCLUSION

For the foregoing reasons, this Court should decline to create a new constitutional right that would bar attributing to the parent/principal the contacts of its subsidiary/agent.

DATED: August 26, 2013

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AMICUS CURIAE BRIEF

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AND
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No. 11-965

In the Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ECONOMIESUISSE, THE SWISS BANKERS ASSOCIATION, ICC SWITZERLAND, ASSOCIATION OF GERMAN BANKS, AND THE EUROPEAN BANKING FEDERATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are associations representing international businesses, global financial institutions, and other companies headquartered outside the United States. They share a strong interest in encouraging stable and predictable legal regimes that promote international trade and investment.[1] The extraterritorial reach of U.S. laws—including U.S. courts' exercise of personal jurisdiction over non-U.S. businesses with respect to those companies' activities outside the United States—creates tremendous uncertainty that deters investment in and trade with the United States. *Amici* regularly file amicus briefs in cases such as this one that raise issues of vital concern to the non-U.S. business community.

The Swiss Bankers Association (SBA) is the leading professional organization of the Swiss financial center; its members include the vast majority of banks and other financial institutions operating in Switzerland. In consultation with Swiss regulatory authorities, the SBA sets standards that govern the operation of banks in Switzerland. It also represents the interests of Swiss banks in dealings with both Swiss and international authorities.

Economiesuisse is the largest umbrella organization representing the Swiss economy. Economiesuisse is comprised of more than 100,000 businesses

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no such counsel or a party has made a monetary contribution to its preparation or submission. No party has made a monetary contribution to this brief other than the *amici curiae*, its members, or its counsel. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

of all sizes, employing a total of 2 million people in Switzerland. Economiesuisse's mission is to create an optimal economic environment for Swiss business, to continuously improve Switzerland's global competitiveness in manufacturing, services and research, and to promote sustained growth as a prerequisite for a high level of employment in Switzerland.

The International Chamber of Commerce Switzerland is a National Committee of the International Chamber of Commerce. Founded in 1922, it represents Swiss companies, chambers of commerce, and business associations.

The Association of German Banks is the voice of the private banks in Germany. As a leading trade association, it stands for a market-based economy and a strong German and European financial center. The Association of German Banks represents the common interests of the private banks at regional, national, and international levels. It mediates between banks, policymakers, authorities, consumers, and the business sector.

The European Banking Federation (EBF) is the leading professional organization of European banks. It provides a forum for European banks to discuss best practices and legislative proposals and to adopt common positions on matters affecting the European banking industry. EBF also actively promotes the positions of the European financial services industry, and the banking industry in particular, in international fora.

SUMMARY OF ARGUMENT

The exercise of general personal jurisdiction over an out-of-forum defendant is an extraordinary judicial power, as it permits a court to entertain a claim

against the foreign defendant *arising from conduct anywhere in the world*. Accordingly, due process restricts exercise of general jurisdiction to circumstances where the defendants' contacts with the forum are so "'continuous and systematic' as to render them ***essentially at home*** in the forum State." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2851 (2011) (emphasis added). Only once has this Court found that exceptionally demanding standard satisfied.

The court below circumvented this analysis by imputing the jurisdictional contacts of a wholly-owned subsidiary to the corporate parent. But that approach is necessarily at odds with the principle of corporate separateness fundamental to the parent-subsidiary relationship, and it ignores that due process requires a court to establish jurisdiction over each defendant individually. It is only where the subsidiary's corporate veil may be pierced that the subsidiary's in-forum contacts may establish general jurisdiction over an out-of-forum defendant.

This rule has significant implications for international comity. The exercise of extraterritorial jurisdiction over a foreign defendant touches precisely the same concerns as the extraterritorial application of U.S. statutes. International commerce requires clear rules that settle where a foreign company is subject to suit. And appropriate limitations on the assertion of U.S. jurisdiction abroad are essential to preclude conflict with the legal systems of countries around the world.

ARGUMENT

I. Appropriate Limits On Personal Jurisdiction Are Essential To Ensure International Cooperation And Encourage Cross-Border Trade And Investment.

The increasingly globalized and interconnected nature of the world economy significantly heightens the risk of collision among the legal systems of individual nations. Companies engaged in international commerce are likely to be subject to the legislative and judicial jurisdiction of dozens of countries, threatening imposition of conflicting, duplicative, and unjustifiably burdensome legal obligations.

Given this reality, broad assertions of extraterritorial jurisdiction—whether legislative or judicial—will inevitably injure both international comity and international commerce. Intruding on what another nation reasonably views as its sphere will produce, and has produced, a form of legal warfare among nations, with countries acting to protect their authority by retaliating against the nation, often the United States, that is perceived to have exceeded its legitimate authority. And imposing multiple and inconsistent burdens on companies that engage in international commerce will increase the costs associated with such activities, deterring valuable commerce that otherwise would take place.

This Court has recognized these risks in the context of legislative jurisdiction. "Foreign conduct is generally the domain of foreign law" and United States law presumptively "governs domestically but does not rule the world." *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 455, 454 (2007) (quotation & alteration omitted). This well-established presumption

against extraterritorial application of federal statutes "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-165 (2004).

The Court has applied the presumption against extraterritorial application consistently in recent years. *E.g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010); *Microsoft Corp.*, 550 U.S. at 455; *F. Hoffmann-La Roche*, 542 U.S. at 164; *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993); *EEOC* v. *Arabian Am. Oil, Co.*, 499 U.S. 244, 248 (1991).

This case brings before the Court questions regarding the extraterritorial scope of *judicial* jurisdiction, and the very same considerations are relevant. After all, "[j]urisdiction is power to declare the law." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). See also *J. McIntyre Mach., Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2786-2787 (2011) (plurality) (recognizing similarity of "the power of a sovereign to resolve disputes through judicial process" and "the power of a sovereign to prescribe rules of conduct for those within its sphere"—"[a]s a general rule neither statute nor judicial decree may bind strangers to the State").

The Court therefore should apply in the judicial jurisdiction context the same approach that it has utilized with respect to legislative jurisdiction—recognizing appropriate, well-defined limits on extraterritorial assertion of judicial jurisdiction to promote and protect international comity and avoid imposition of unjustified burdens on international commerce.

Indeed, the close relationship between extraterritorial assertion of legislative jurisdiction and extraterritorial assertion of judicial jurisdiction is demonstrated by this case. The Court's holding in *Kiobel* eliminates respondents' claim under the Alien Tort Statute (ATS), but respondents continue to press a virtually identical claim under state law.

And respondents are not unique. The proponents of ATS lawsuits have made clear that they intend to use broad theories of judicial jurisdiction to continue to litigate claims of "human rights violations" in U.S. courts: "the next round of international human rights cases will be filed under state law in federal court and, in some cases, under state law in state courts." Donald Childress, *Kiobel commentary: An ATS answer with many questions (and the possibility of a brave new world of transnational litigation)*, SCOTUSblog (Apr. 18, 2013), http://tinyurl.com/myosjcm.[2] ATS claims will be revamped as garden-variety tort claims coupled with the assertion of general jurisdiction by a U.S. court.

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[2] See also Beth Stephens, *Closing Avenues for Relief*, Opinio Juris (Apr. 23, 2013), http://tinyurl.com/m797jam ("[S]tate courts [are] a likely venue for cases that can no longer be litigated in federal court. Most ATS cases have included related state law claims, and some have already been litigated in state courts."); Roger Alford, *The Death of the ATS and the Rise of Transnational Tort Litigation* (Apr. 17, 2013), http://tinyurl.com/ln6dxwy ("[T]he future of human rights in domestic courts is transnational tort litigation. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment. In the quest to provide relief for victims of grave abuse, international human rights violations will now be reframed as transnational torts. Virtually every complaint pleading an ATS violation could allege a traditional domestic or foreign tort.").

But reframing these lawsuits does not alter the fact that, when a foreign plaintiff sues a foreign company for foreign conduct, the United States has no legitimate interest in the suit. In fact, given the position of foreign nations, providing such a cause of action could well "generate[] "diplomatic strife." *Kiobel*, 133 S. Ct. at 1669. It would "imply that other nations * * * could hale our citizens into their courts" for wrongful conduct "occurring in the United States, or anywhere else in the world." *Ibid.* But "[t]he presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Ibid.*

As Justice Breyer noted, "it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an 'enemy of all mankind.'" *Kiobel*, 133 S. Ct. at 1678 (Breyer, J., concurring in judgment).

A. Limiting Extraterritorial Assertions Of Judicial Jurisdiction Is An Essential Element Of International Comity.

"Comity," the Court has explained, reflects "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale* v. *U.S. Dist. Ct.*, 482 U.S. 522, 543 n.27 (1987). Appropriately limiting the exercise of personal jurisdiction over foreign entities is an essential element of the respect due to the judicial systems of other nations. Thus the "procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien

defendant" and "the Federal interest in Government's foreign relations policies" "will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case." See also *Asahi Metal Indus. Co.* v. *Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987) (plurality).

Indeed, foreign nations have lodged objections to expansive U.S. jurisdiction. Thus, "applying the American conception of general jurisdiction" "to disputes without any relationship to the United States" often "is viewed with [abhorrence] by many other nations." Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 Seton Hall L. Rev. 807, 900 (2004). In attempting to draft an international agreement regarding private law, delegates found "American-style 'doing business' general jurisdiction * * * as sufficiently exorbitant to merit blacklisting." Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 162 (2001).

This Court has recognized that perceived affronts to sovereign interests will predictably "invite retaliatory action from other nations." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). That is what is happening now—and would increase exponentially if the lower court's uniquely expansive standard were upheld.

As Judge O'Scannlain noted, "several countries have enacted 'retaliatory jurisdictional laws.'" *Bauman* v. *DaimlerChrysler Corp.*, 676 F.3d 774, 779 (2011) (O'Scannlain, J., dissenting from denial of rehearing en banc). As one example, "Italian courts will exercise jurisdiction over actions by Italian nationals against foreigners, provided that the foreigner's courts would entertain claims against Italians in like circumstances." Gary B. Born, *Reflections on Ju-*

dicial Jurisdiction in International Cases, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987). Other countries, including Austria, Belgium, and Portugal, have also embraced such policies. *Ibid.*

Particular sensitivity to other nations' views on the proper reach of extraterritorial personal jurisdiction is necessary given the "long history of aggressive assertions of jurisdiction and retaliation." Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 Nw. U.L. Rev. 455, 464 (2004) (discussing "'retaliatory' jurisdiction"). See also William M. Richman, *Understanding Personal Jurisdiction*, 25 Ariz. St. L.J. 599, 642 (1993) ("Expansive exercises of jurisdiction by American courts may trigger political, judicial, or economic retaliation."). It can be no surprise that "[i]nternational tensions rise if foreign judgments are not recognized and domestic tensions rise if they are recognized in defiance of national values." Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 Berkeley J. Int'l L. 44, 46 (2001).

Requiring a foreign company to answer in a U.S. court for conduct in Argentina that allegedly violated Argentinean law thus has adverse implications for international comity no different than subjecting a foreign company to U.S. securities, antitrust, or human rights law. Interests of comity accordingly weigh heavily against the expansive jurisdictional standard adopted below—a rule that has the predictable consequence of exposing foreign entities to claims in U.S. courts that have nothing at all to do with the United States.

B. Broad Assertions Of Extraterritorial Jurisdiction Will Deter Cross-Border Commerce.

This Court has recognized that for rules governing judicial jurisdiction "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). Indeed, due process limits on judicial jurisdiction are designed to ensure "a degree of predictability * * * that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

A jurisdictional rule that fails to meet this test—and instead produces unpredictable results biased in favor of expansive assertions of jurisdiction—will force foreign businesses to take the steps necessary to ensure that they will not become subject to suit in U.S. courts on every claim arising anywhere in the world. See also *Asahi Metal*, 480 U.S. at 114 (recognizing the "unique burdens placed upon one who must defend oneself in a foreign legal system").

Indeed, given the uniquely expansive procedural rules governing civil litigation in the United States—including broad discovery; the prospect of large damages awards dwarfing those available in most other countries; contingent-fee representation of plaintiffs; and the virtual prohibition against shifting of litigation costs to a losing plaintiff (*cf. Morrison*, 130 S. Ct. at 2885)—there is no doubt that foreign enterprises would revamp their operations to avoid subjecting themselves to general jurisdiction in U.S. courts, even if that would require relocating or significantly reducing their U.S. operations. *Cf.* Alan O. Sykes,

Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis, 100 Geo. L.J. 2161, 2178 (2012).

To the extent that the decision below states a predictable rule—that imputation is allowed whenever a subsidiary's actions are "sufficiently important" to the parent such that, absent the subsidiary, the parent would find another way to accomplish those tasks, *Bauman* v. *DaimlerChrysler Corp.*, 644 F.3d 909, 920 (2011)—it states a rule so broad that virtually every foreign company with a U.S.-based distribution subsidiary would automatically be swept within its ambit.

If that standard were upheld, significant numbers of non-U.S. companies would abandon, or choose not to invest in, U.S. based-subsidiaries. *Cf.* Tamar Frankel, *Using the Sarbanes-Oxley Act to Reward Honest Corporations*, 62 Bus. Law. 161, 192 (2006) (in light of U.S. regulatory measures, corporations have "relocate[d] abroad" and "some foreign corporations avoid the United States"). Instead of a wholly-owned subsidiary that engages in U.S. distribution, a non-U.S. manufacturer would likely move to an independent distribution network in the United States.

Some companies may choose to withdraw from the U.S. market entirely rather than running the risk of exposure to general jurisdiction in U.S. courts.

These consequences would inflict significant harm upon the U.S. economy. They would decrease foreign direct investment, which contributes significantly to our economy. Statement by the President on United States Commitment to Open Investment Policy (June 20, 2011), http://tinyurl.com/3fcoons. They would remove the tax base that those subsidi-

aries generate. (In 2009, foreign-controlled domestic corporations accounted for nearly 14% of total corporate income tax collected. See IRS, *SOI Tax Stats—Foreign-Controlled Domestic Corporations*, Tbl.1, http://tinyurl.com/nxepsas). And they would discourage foreign entities from opening U.S.-based operations that employ American workers. See Charles G. Schott, U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, at 5-6 (Oct. 2008), http://-tinyurl.com/bnyzc8m.

Indeed, a 2007 report commissioned by Mayor Bloomberg and Senator Schumer found that a key hindrance to U.S. competitiveness is "America's general propensity for litigation" and "the increasing extraterritorial reach of US law." *Sustaining New York's and the US' Global Financial Services Leadership*, at 73 (2007), http://tinyurl.com/bzkr44n. Likewise, the Department of Commerce's report tied concerns about the U.S. legal system to foreign direct investment. Schott, *supra*, at 1-2. "There is an international perception that the pervasive nature of litigation in the United States and other related aspects of the legal system increase the costs of doing business and add uncertainty." *Id.* at 1. Predictable legal rules, by contrast, provide a climate conducive to foreign investment. *Id.* at 2.

Respect for international comity and appropriate limitations on the reach of U.S. jurisdiction over conduct occurring abroad is critical to promote the interests of foreign commerce and investment.

II. A Subsidiary's Jurisdictional Contacts May Be Imputed To The Corporate Parent Only When It Is Permissible To Pierce The Corporate Veil.

Respondents acknowledge that their claim hinges on the exercise of general jurisdiction over an out-of-forum defendant. Such an exercise of judicial power is extraordinary, requiring a foreign defendant to answer in U.S. courts for *any* claim arising *anywhere* in the world. As this Court has made clear, such power is reserved for only the most exceptional circumstances.

Respondents cannot circumvent the strict limitations on general jurisdiction by imputing the jurisdictional contacts of an in-forum subsidiary to an out-of-forum parent. That theory turns the principle of corporate separateness on its head, and it is incompatible with basic notions of due process.

For these reasons, the Court has rejected such efforts on multiple occasions. Instead, imputation of contacts is permissible only where a court may pierce the corporate veil of the subsidiary, which eliminates the legal separateness of the two entities.

A. A Court May Assert General Jurisdiction Over An Out-Of-Forum Defendant Only In Extraordinary Circumstances.

The standard governing a court's exercise of personal jurisdiction has long been settled: "A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *J. McIntyre Mach.*, 131 S. Ct. at 2787 (plurality) (quoting *Int'l Shoe Co.* v. *Wash.*, 326 U.S. 310,

316 (1945)). General "jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them" is appropriate only "when their affiliations with the State are so 'continuous and systematic' as to render them ***essentially at home*** in the forum State." *Goodyear*, 131 S. Ct. at 2851 (emphasis added).

Since *International Shoe*, the Court has on three occasions addressed whether an out-of-forum defendant could be subjected to general judicial jurisdiction. These decisions demonstrate that the exercise of such jurisdiction is permissible only in exceptional circumstances.

Perkins v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), is the "textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Goodyear*, 131 S. Ct. at 2856 (quotation omitted). There, the defendant was a Philippine mining corporation, but it had ceased activities in the Philippines during World War II. *Perkins*, 342 U.S. at 447-448. Instead, the company's president "maintained an office" in Ohio at which he kept "office files of the company;" he distributed "salary checks on behalf of the company" from Ohio; he "used and maintained in * * * Ohio, two active bank accounts carrying substantial balances of company funds;" an Ohio bank "acted as transfer agent for the stock of the company;" "[s]everal directors' meetings were held at his office or home" in Ohio; and the president "supervised policies" relating to the company's Philippine operations from Ohio. *Ibid.*

The company president thus maintained "in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company."

Perkins, 342 U.S. at 448. General jurisdiction was appropriate, because Ohio had become "the corporation's principal, if temporary, place of business." *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 779-780 n.11 (1984).

Perkins is in substantial contrast with the limited activity present in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408 (1984). There, the estates of U.S. citizens who died in a helicopter crash in Peru brought suit in Texas against the Colombian corporation that operated the helicopter. *Helicopteros*, 104 U.S. at 412. A representative of the Colombian company had met in Houston to negotiate a contract for the provision of helicopter services in Peru; the company purchased helicopters and parts in Texas; it sent employees there for training; and a customer wired it money from Texas. *Id.* at 411-412. The Court concluded that these contacts, taken together, were not "continuous and systematic general business contacts" (*id.* at 416) and thus they "were insufficient to satisfy the requirements of the Due Process Clause" (*id.* at 418-419).

Most recently, in *Goodyear*, plaintiffs brought claims in North Carolina against subsidiary corporations based in Luxembourg, Turkey, and France. 131 S. Ct. at 2851-2852. These entities were "not registered to do business in North Carolina;" they did "not design, manufacture, or advertise their products in North Carolina;" they did "not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers," but "a small percentage" of their products "were distributed within North Carolina." *Id.* at 2852. These contacts, the Court concluded, "fall far short of the 'the continuous and systematic general business contacts' necessary to em-

power North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." *Id.* at 2857. The companies were "in no sense at home in North Carolina." *Ibid.*

The general jurisdiction standard "is demanding because the consequences can be severe: if a defendant is subject to general jurisdiction in a state, then it may be called into court there to answer for any alleged wrong, committed in any place, no matter how unrelated to the defendant's contacts with the forum." *uBID, Inc.* v. *GoDaddy Grp., Inc.*, 623 F.3d 421, 426 (7th Cir. 2010).

Under the holding below, a California court would have personal jurisdiction over *any* claim against Daimler AG arising *anywhere* in the world: an individual who slipped and fell at Daimler AG's Stuttgart headquarters could bring suit in California. See *ibid.* That broad rule is fundamentally inconsistent with this Court's precedents.

B. Piercing The Corporate Veil Is An Essential Prerequisite To Imputing A Subsidiary's Jurisdictional Contacts To Its Parent.

Respondents do not attempt to support the assertion of general jurisdiction on the basis of direct contacts between Daimler AG and California. They instead rely on the conclusion of the court below that the contacts of a U.S.-based subsidiary may be imputed to Daimler AG because the subsidiary's services are "sufficiently important" to the parent. See *Bauman*, 644 F.3d at 920. The court defined "sufficiently important" as those services which "the parent would undertake to perform * * * itself *if it had no representative at all* to perform them." *Id.* at 921.

That holding is wrong. Because a court must establish jurisdiction over each defendant independently, the jurisdictional contacts of a domestic subsidiary are relevant to an out-of-forum parent only when the corporate veil between parent and subsidiary may be pierced. Indeed, this Court's precedent compels that conclusion and basic requirements of "fair play and substantial justice" confirm this approach. Respondents defend the result below by claiming it is necessary to prevent a parent from shielding itself against claims *from the forum*, but that argument misunderstands the distinction between specific and general jurisdiction.

First, jurisdiction over a party must rest upon that party's own contacts with the forum. The "unilateral activity of another party or a third person" cannot establish personal jurisdiction because exercise of a court's authority is proper only "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475-76 (1985) (quotation omitted). Constitutional due process requirements, accordingly, "must be met as to each defendant over whom a state court exercises jurisdiction." *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980).

It also is beyond dispute that a parent corporation and its subsidiary are separate entities. "'A corporation and its stockholders are generally to be treated as separate entities;'" thus it is "deeply 'ingrained in our economic and legal systems' that a parent corporation * * * is not liable for the acts of its subsidiaries." *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) (quoting *Burnet* v. *Clark*, 287 U.S. 410, 415, (1932) and William O. Douglas & Carrol M.

Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 193 (1929)).

Applying these fundamental principles, this Court's decisions make clear that a parent's in-state subsidiary—no matter how "important" the subsidiary's services are, and no matter how tightly the parent controls the subsidiary—cannot overcome the necessity of establishing jurisdiction on the basis of the parent's own, independent contacts with the forum.

In *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 334-335 (1925), for example, the Court considered whether a Maine-based company "was doing business" in North Carolina "in such a manner and to such an extent as to warrant the inference that it was present there." The plaintiff relied on the jurisdictional contacts of the defendant's wholly-owned subsidiary—the Cudahy Packing Company of Alabama. *Id.* at 335. That entity "is the instrumentality employed to market [defendant's] products within" North Carolina. *Ibid.* The Court found that the defendant "dominates the [subsidiary], immediately and completely, and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the [defendant's] products in other states." *Ibid.*

The separate corporate forms, however, were "in all respects observed:" the "books are kept separate," and "[a]ll transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations." *Cannon*, 267 U.S.

at 335. "This corporate separation," the Court concluded "was doubtless adopted solely to secure to the defendant some advantage under the local laws." *Ibid.*

Nevertheless, the Court flatly rejected imputation of the subsidiary's jurisdictional contacts to the parent. The defendant "did not choose to enter the state in its corporate capacity" (*Cannon*, 267 U.S. at 336); it "preferred to employ a subsidiary corporation" (*ibid.*). It is "settled," the Court reasoned, that "such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction." *Ibid.* Although the separation between parent and subsidiary was "perhaps merely formal," it was nonetheless "real" and "not pure fiction." *Id.* at 337. Thus, where there is "no attempt to hold the defendant liable for an act or omission of its subsidiary"—i.e., to pierce the corporate veil—the subsidiary's contacts are not relevant to the parent. *Ibid.*[3]

Just eight years later, the Court again held that the presence of a subsidiary in the forum—even if the subsidiary is at its parent's beck and call—is irrelevant to the forum's ability to assert jurisdiction over the parent. *Consolidated Textile Corp.* v. *Gregory*, 289 U.S. 85, 87 (1933), involved a suit in Wiscon-

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[3] *Cannon* was not the first decision of this Court to reject imputation of a subsidiary's contacts to a parent. See, *e.g.*, *People's Tobacco Co.* v. *Am. Tobacco Co.*, 246 U.S. 79, 87 (1918) ("The fact that the company owned stock in the local subsidiary companies did not bring it into the State in the sense of transacting its own business there."); *Conley* v. *Mathieson Alkali Works*, 190 U.S. 406, 409 (1903) ("The new corporation was a separate legal entity, and, whatever may have been the motives leading to its creation, it can only be regarded as such for the purposes of legal proceedings.").

sin that required the court to exercise general jurisdiction over an out-of-state defendant.

To support its position, the plaintiff argued that a "wholly controlled" subsidiary of the defendant sold goods in Wisconsin. *Consolidated Textile*, 289 U.S. at 88. The Court curtly dispatched this alleged jurisdictional contact: "The unimportance of the statement concerning acts of the controlled corporation * * * is clear enough in the light of what we said in *Cannon*." *Ibid.* The Court concluded that "[i]n order to hold a foreign corporation not licensed to do business in a state responsible under the process of a local court the record must disclose that it was carrying on business there at the time of attempted service," and—notwithstanding the presence of a wholly controlled subsidiary—it was "plain[]" that the defendant "was not present within the jurisdiction of Wisconsin as required." *Ibid.*

Recently, in *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 705 n.* (1988), the Court considered the constitutional requirements of service of process and explained that under "the Due Process Clause of the Fourteenth Amendment, it is not self-evident that substituted service on a subsidiary is sufficient with respect to the parent." That was because, in *Cannon* and *Consolidated Textile*, "this Court held that the activities of a subsidiary are not necessarily enough to render a parent subject to a court's jurisdiction." *Ibid.*[4]

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[4] Although *Cannon*, 267 U.S. at 336, suggested that no question of "constitutional powers" was "directly presented" in that case, *Consolidated Textile*, by way of its reliance on *Philadelphia & Reading Railway Co.* v. *McKibbin*, 243 U.S. 264 (1917) and *International Harvester Co.* v. *Kentucky*, 234

These holdings make clear that only where the corporate veil may be pierced—and the corporate separateness of parent and subsidiary set aside—may a court impute a subsidiary's contacts to a parent. As the Court recently explained, "merging parent and subsidiary for jurisdictional purposes requires an inquiry 'comparable to the corporate law question of piercing the corporate veil.'" *Goodyear*, 131 S. Ct. at 2857 (quoting Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 14, 29-30 (1986)).

Piercing the corporate veil is a demanding standard; it is appropriate in only "exceptional circumstances," *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003), and requires a showing that the corporate form is a "fiction." *Cannon*, 267 U.S. at 337. Alternatively, there must be proof that "the corporate form would otherwise be misused to accomplish certain wrongful purposes" (*Bestfoods*, 524 U.S. at 62)—such as fraud on shareholders or inadequate capitalization. *Anderson* v. *Abbott*, 321 U.S. 349, 362 (1944).

So long as the corporate veil cannot be pierced, no imputation is permissible. The Ninth Circuit's rule is wholly antithetical to this Court's clear teachings, and thus it cannot stand.

Second, this conclusion is bolstered by the "'traditional notions of fair play and substantial justice'" that govern the due process inquiry. *Asahi Metal*, 480 U.S. at 113 (quoting *Int'l Shoe*, 326 U.S. at 316).

U.S. 579 (1914), plainly was a constitutional decision. *Schlunk* makes clear that these decisions turn upon due process analysis. 486 U.S. at 705 n.*.

This analysis may consider "several factors" including "the burden on the defendant," "the interests of the forum State," "the plaintiff's interest in obtaining relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies." *Ibid.* (quotation omitted).

These considerations point decisively against imputing a subsidiary's contacts to a parent for purposes of general jurisdiction without the showing necessary to pierce the corporate veil.

Interest of the forum state. When a court exercises general—rather than specific—jurisdiction, it is considering a circumstance where neither the conduct nor the injury at issue occurred in the forum. See *Goodyear*, 131 S. Ct. at 2854 (specific jurisdiction applies to acts "occurring or having their impact within the forum State"). In these circumstances, the forum will have only a minimal interest in the subject of the suit.

And where the basis for jurisdiction is said to be imputation of a subsidiary's contacts to the parent, the forum state is yet another order of magnitude removed, because it does not even have a direct interest in regulating the conduct of the defendant, as it would if the defendant were its own corporate citizen.

This case provides a paradigmatic example: California has no interest in the adjudication of claims against a non-California company for alleged actions of its non-California subsidiary that occurred outside of California—at least, no interest greater than Vietnam, Serbia, or any other forum chosen at ran-

dom.[5] But Argentina (as the place where the plaintiffs reside and the place where the unlawful events allegedly occurred) and Germany (the domicile of Daimler AG) do have substantial interests in the subject of this suit, the parties to the suit, or both.

Interest in efficient resolution of controversies. Substantial justice requires consideration of "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction" in a U.S. forum. *Asahi Metal*, 408 U.S. at 115. Thus, "'[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Ibid.* (quoting *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). Imputing the jurisdictional contacts of a subsidiary to the out-of-forum parent would offend the interstate—and, here, international—interests in efficient resolution of claims. See *id.* at 113, 115. Those interests militate in favor of a forum in Argentina, where the witnesses and evidence are centered (or at least Germany, where the defendant is located).

Burden on Defendant. Finally, the inconvenience for the litigants associated with asserting general jurisdiction over a parent based on little more than the presence of a subsidiary is here "so substantial as to

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[5] Incidentally, Daimler AG has wholly-owned subsidiaries in Vietnam (Mercedes-Benz Vietnam Ltd.), Serbia (Mercedes-Benz Srbija i Crna Gora d.o.o.), and dozens of other countries around the world. Daimler Annual Report 2012 § 7.96, at 266-275, http://tinyurl.com/l5pm9gu (listing of subsidiaries). A substantial majority of the world's population is serviced by a Daimler AG subsidiary. *Ibid.*

achieve *constitutional* magnitude." *Burger King Corp.*, 471 U.S. at 484.

As this case illustrates, a forum that has no connection whatsoever to the claim will often be an enormously inconvenient place to litigate the suit. The inconvenience of this action is manifest—the plaintiffs are residents of Argentina (*Bauman*, 644 F.3d at 912); following *Kiobel*, any claims that remain must turn on Argentinean law;[6] the suit challenges events that occurred in Argentina; and all relevant documents and witnesses are located in Argentina (or, potentially, Germany).

Considering all of the applicable factors, imputation of contacts based on the Ninth Circuit's liberal "agency" test would offend traditional notions of fair play and substantial justice. Only if the corporate veil were pierced, so that the subsidiary merged with the parent into a single juridical entity, could the balance possibly be different.

Third, in contesting this veil-piercing rule, respondents fashion a straw man, suggesting that requiring veil piercing would permit foreign companies to escape liability for wrongful acts. Respondents warn of "evasion of responsibility for unlawful conduct in fora in which the corporation otherwise takes

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[6] The asserted Torture Victim Protection Act claims are no longer viable as a result of *Mohamad* v. *Palestinian Authority*, 132 S. Ct. 1702 (2012). Although plaintiffs purport to also sue pursuant to the laws of California, it is hard to see how the relevant choice of law principles would point to California law as controlling, given that the allegedly wrongful conduct occurred in Argentina, the alleged injury was in Argentina, all plaintiffs are Argentineans, and the defendant is not a California resident.

full advantage of the state's laws and legal systems." Br. in Opp. 33. They claim that "[i]t would be entirely unfair to allow the company to enjoy" the "benefits" of a forum, "including its laws and economic markets" "without accepting the concomitant responsibility of submitting to the jurisdiction of the state's courts." *Id.* at 28. These concerns are fundamentally misguided in two separate respects.

To begin with, respondents offer no reason why an adequate remedy cannot be had against the in-forum subsidiary for the subsidiary's own actions. The subsidiary will be subject to personal jurisdiction in the forum for any claim of injury resulting from conduct there. A claimant would gain nothing by also suing the parent. Of course, if the subsidiary is undercapitalized against foreseeable exposure and thus judgment-proof, that could support veil-piercing. See *Anderson*, 321 U.S. at 362.

Moreover, the hypotheticals respondents posit all involve injuries occurring *within the forum*. Of course, it is specific—not general—jurisdiction that is relevant when the forum is the site of either the injury or the wrongful conduct. See *Goodyear*, 131 S. Ct. at 2854. And the standards for specific jurisdiction are far more relaxed than are those for general. *Ibid.* This case, however, does not involve specific jurisdiction and the Court need not address respondents' hypotheticals to resolve it.

The subsidiary-parent relationship, including evidence that a parent controls the subsidiary as an agent, may well be relevant for *specific* jurisdiction. For example, if a subsidiary within a forum acts pursuant to the direction of its foreign parent, the out-of-forum actions of the parent may subject it to specific jurisdiction under the "effects" test of *Calder* v.

Jones, 465 U.S. 783, 788-789 (1984). In such a circumstance, the parent, by acting through its subsidiary, may have taken actions "expressly aimed" at the forum. *Id.* at 789. See also *Burger King*, 471 U.S. at 479 n.22.

While a purported agency relationship between a subsidiary and its parent thus might possibly be relevant for a specific jurisdiction theory, "ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant." *Goodyear*, 131 S. Ct. at 2855.

What respondents wish to overlook is that *their* claim has nothing at all to do with conduct or injury *in California*. Instead, their claim necessarily relies on general jurisdiction because they seek to hold Daimler AG liable for things that have no relationship whatsoever with the forum they chose.

There is nothing unfair about preventing California from becoming a global forum for adjudication of every claim against Daimler AG and all of its subsidiaries—otherwise, its courts would be available for a Stuttgart-based accountant to dispute her termination from Daimler AG or an Ankara-based parts supplier to contest the terms of payment on a contract with a Turkish subsidiary.

This Court should reject that conclusion and reaffirm the basic proposition that a subsidiary's contacts with a forum may not be imputed to a parent in the absence of proof permitting the piercing of the corporate veil between parent and subsidiary.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,
Petitioner,

v.

BARBARA BAUMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* GERMAN INSTITUTE FOR HUMAN RIGHTS AND OTHER GERMAN LEGAL EXPERTS IN SUPPORT OF RESPONDENTS

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The **German Institute for Human Rights** (*Deutsches Institut für Menschenrechte*, DIMR or "the Institute") is Germany's accredited independent National Human Rights Institution in compliance with the United Nations Paris Principles.[1] The Institute's function is to contribute to the promotion and protection of human rights in Germany and internationally. Since its founding in 2001, the Institute has played an active role in shaping politics and public opinion on all human rights issues at the national as well as on the U.N. and European level. Furthermore, it monitors the human-rights-sensitive activities of the German government outside the country. The Institute has the power and responsibility to submit to any competent body on an advisory basis legal opinions on any matter concerning the promotion and protection of human rights. In particular, it has an interest in the present case because Germany has been identified as a potential alternative forum for the dispute, and the Institute wishes to highlight before this Court the significant hurdles that plaintiffs face in German courts when seeking compensation for human rights violations. Additionally, the Federation of German Industries,

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[1] Pursuant to rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no such counsel or a party has made a monetary contribution to its preparation or submission. No party has made a monetary contribution to this brief other than the *amici curiae*, their members, or their counsel. The parties' letters consenting to the filing of this brief have been filed with the clerk's office.

the German Chambers of Industry and Commerce, and individual German firms have, in their amicus curiae briefs in support of petitioner, invoked legal and policy arguments which are not representative of German legal opinion at large and merit a response before this Court.

Amici are also **German legal experts** and scholars from leading institutions of higher learning and independent and non-profit institutions in Germany. They have extensive knowledge and experience in international law, human rights law, and comparative law. In addition to researching and teaching these subjects, they regularly advise governments, organizations, and individuals on international legal issues. As legal experts working in Germany, they consider it their responsibility to respectfully submit this brief in order to assist the Court in coming to an understanding that better reflects the opinions of German legal scholarship on the important issues raised in this case. Short summaries of their biographies are appended in the Appendix to this brief.

SUMMARY OF ARGUMENT

Faced with the choice between having a case heard in a court in the United States and another forum, U.S. jurisdiction rules recognize that the U.S. court is the proper venue if the other forum offers a remedy that is so clearly inadequate that it is no remedy at all.

For the respondent victims of serious violations of internationally-recognized human

rights in this case, and for others like them, Germany is an inadequate alternative forum. German courts would apply the harsh limitation period of the *lex loci damni*, and German law imposes additional logistical and financial hurdles on non-European plaintiffs that effectively close off the German courts to the respondents in this case.

The Ninth Circuit has set forth a standard for the exercise of personal jurisdiction that recognizes both the need to provide a forum to victims of serious human rights violations making claims against a company who, at the time the claims were filed, was jointly headquartered and continuously and systematically doing business in the United States, while at the same time protecting foreign parent companies from standard commercial disputes when those companies' presence in the United States is limited to mere investment.

The test developed by the Ninth Circuit is in line with United States personal jurisdiction law, its commercial interests, its foreign policy, and international human rights standards. It should be upheld.

ARGUMENT

I. Germany is not a reasonable alternative forum for this dispute.

It is a fundamental principle of international law that the same acts "may lawfully be within the ambit of more than one jurisdiction." *See* Brownlie, *Principles of Public International Law* (7th ed., 2008) at 312. When faced with two plausible forums for the litigation of a claim, United States law

recognizes the right of the defendant to seek a dismissal of the action in U.S. courts e.g. under the *forum non conveniens* doctrine when a trial in the foreign jurisdiction would be more convenient. Such a motion cannot be defeated by a mere showing that the foreign law would be less favorable to the plaintiffs. *See Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U. S. 413 (1932).

However, this Court recognized in *Piper Aircraft Co. v. Reyno* that when choosing between the United States and the other potential forum, "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight" in the determination of which forum is appropriate for trying the action. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).

The same principle is reflected in the Ninth Circuit's assessment of whether it would be reasonable to exercise general personal jurisdiction over petitioner when it considered the existence of an alternate forum in which to adjudicate this matter. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 928–29 (9th Cir. 2011).[2] Because of the law

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[2] Assessment of other reasonableness factors is beyond the scope of this brief. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). *Amici*, however, make the following observations with regard to two factors, sovereignty of foreign nations and interests of the forum state: On the first, Germany has not entered an appearance in this litigation nor has it expressed its concern that allowing this case to proceed impinges upon German sovereignty. On the second, the United States generally, and California specifically, has demonstrated its interest in providing a

German courts would apply to such an action and the procedural, technical, and financial hurdles they impose upon non-European plaintiffs, the German courts would not provide any remedy at all to the respondents in this case or others similarly situated.

A. German courts would apply substantive law that bars any claims against the German parent company arising out of these human rights abuses.

Upon the filing of a civil claim, German courts engage in a *sua sponte* examination of whether they have personal and subject-matter jurisdiction over the matter at hand, as required by §§ 1, 12, and 17 of the Zivilprozessordnung [Code of Civil Procedure] [ZPO] (Ger.). German courts have both personal and subject-matter jurisdiction over Daimler AG, since it is domiciled in Stuttgart, Baden-Württemberg, but the conflict of laws rules that German courts would then apply to a claim based on human rights abuses committed in Argentina render that jurisdiction useless to the respondents.

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forum for adjudication of serious human rights violations, particularly when U.S. interests are implicated in the suit. This Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), in which the Court held that the presumption against extraterritorial application of the Alien Tort Statute, 28 U.S.C. § 1350, could be displaced when "the claims touch and concern the territory of the United States...with sufficient force," reflects and affirms that interest.

1. Under any of the available conflicts rules, German courts would apply Argentine law.

German courts decide non-contractual liability claims according to their own procedural law, but they apply substantive law as dictated either by Art. 40 of the Einführungsgesetz zum bürgerlichen Gesetzbuch [Act Introducing the Civil Code] [EGBGB] (Ger.) or by EC Regulation 864/2007 (E.U.) (the 'Rome II' regulation). The Rome II Regulation, however, only applies to events arising on or after January 11, 2009. It is not open to the parties to waive this time limit, even by mutual agreement. *See* Case C-412/10, *Homawoo v. GMF Assurances S.A.*, [2012] I.L.Pr. 2 (Court of Justice of the European Union).

Under Art. 40 EGBGB, the substantive law applied is that of the territory where the tortfeasor committed the tortious conduct. As an alternative, the plaintiff can demand that the law of the territory where the injurious effect of the conduct is felt: Art. 40(1) EGBGB. Under either of these alternatives, a German court would apply the substantive law of Argentina as it was in force at the time the alleged human rights abuses occurred.

2. Applying Argentine law bars respondents' claims.

This conflict of laws rule effectively bars a claim in Germany because German courts must apply substantive Argentine law, which either entirely refuses to recognize these types of claims or has declared such claims barred by the Argentinian

limitation period.[3] As the Ninth Circuit made clear, Article 3980 of the Código Civil de la República Argentina [Argentine Civil Code] (Arg.) imposes an extremely tight limitation period of two years and three months on such civil claims,[4] meaning that they would be time-barred under the applicable law. *See Bauman,* 644 F.3d at 928; Corte Supreme de Justicia de La Nacion [CSJN] [Supreme Court of Justice of Argentina], 30/10/2007, "Larrabeiti Yanez, Anatole Alejandro y otro c/Estado Nacional/ proceso de concocimiento" L.L. (2008-F-23) (Arg.).

3. None of the possible exceptions to this conflicts rule could be invoked by the respondents.

Because of the strict time limit contained in the Rome II Regulation, respondents would be forced to rely on exceptions to the conflicts rule in Art. 40 EGBGB.[5] *See Homawoo v. GMF Assurances*

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[3] In German law, the statute of limitations (*Verjährungsfrist*) is a matter of substantive law, which has the potential to produce irrational results when applying the substantive law of systems which treat the limitation question as one of procedure. German conflicts rules thus always treat the statute of limitations as belonging to substantive law, regardless of the position in the foreign legal system. See Kegel/Scheurig, *IPR* (2004), p. 636.

[4] Although there is no statute of limitations for criminal proceedings in respect of these claims, neither do criminal proceedings have any prospect of securing monetary compensation for the respondents.

[5] If the conduct at the core of the respondents' suit had occurred after January 11, 2009, it would be open to them to plead the "mandatory overriding provision" exception under Art. 16 of the Rome II Regulation and potentially apply

S.A. These amount essentially to (a) mutual agreement to apply German law, *see* Art. 42 EGBGB, or (b) a finding by the court that in all the circumstances of the case, the facts were much more closely related to German law than they were to Argentinian law. Such a finding would require e.g. a prior existing legal relationship between the parties governed by German law or that both parties be domiciled in Germany even if the tortious conduct took place elsewhere. *See* Art. 41 EGBGB; Palandt/Thorn, *BGB* (69th ed., 2010) EGBGB 40 para. 6–7. Neither of these exceptions applies here.[6]

B. Proceedings in Germany are not viable because of the extremely high costs imposed upon non-European plaintiffs.

1. Non-European plaintiffs must cover their opponent's costs in advance.

German tort law, which recognizes a tort-law claim for human rights violations under § 823(1) of the Bürgerliches Gesetzbuch [Civil Code] [BGB] (Ger.) that can lead to direct compensation under the damages provision of § 253(2) BGB.

[6] Even if it were open to the German court to apply German substantive law, courts have routinely applied the default three-year statute of limitations (§ 195 BGB) to claims of serious human rights violations, despite the apparent availability of a 30-year statute of limitations for intentional torts of bodily injury (§ 199(2) BGB). *See* Franke, "Zum zivilrechtlichen Schadenersatzanspruch bei sexuellem Missbrauch" FamRZ 2012, 1535. This has lead the German legislator to explicitly extend the statute of limitations to 30 years for all intentional torts resulting in of bodily injury, wrongful death, or sexual assault via a revision to § 197(1)(1) BGB which took effect on July 1, 2013 – too late to come to the assistance of the respondents in this case.

German courts differentiate in the costs they impose upon plaintiffs between European and non-Europeans. Non-Europeans are required to pay a sum into court sufficient to cover their opponents' costs should the claim fail: § 110(1) ZPO. This deposit is due at the filing of the claim, and its amount is determined by the court's estimate of the defendant's potential legal fees and expenses. Should the defendant's actual costs exceed this estimate, the court stays the proceedings until the plaintiffs pay into court an additional amount sufficient to cover those costs: § 112(3) ZPO; *see also* Bundesgerichtshof [BGH] [Federal Supreme Court] Jun. 30, 2004, NJW-RR 2005, 148 (Ger.); Zöller/Herget, *ZPO*, § 112 para. 2 (26th ed., 2007).

2. German law does not recognize discovery, and plaintiffs in German courts face massive translation costs for non-German evidence.

German law provides no means of court-supported evidence collection similar to e.g. 28 U.S.C. § 1782 to compel opposing parties to hand over documents even if these might be detrimental to their position. The inadequacy of this situation was recognized by the Seventh Circuit in *Heraeus Kulzer GmbH v. Biomet*, in which Judge Posner pointed out that a plaintiff in German proceedings "cannot obtain even remotely comparable" discovery under German rules of procedure, where plaintiffs can only demand the production of evidence if they can specifically describe it and set forth the basis of their belief that it is under the defendant's control. *See Heraeus Kulzer GmbH v. Biomet, Inc*, 633 F.3d

591, 596 (7th Cir. 2011), §§ 420–430 ZPO; Baumbach *et al.*, *ZPO* (68th ed., 2010), §§ 421–426. What documents or evidence the plaintiffs might have or be able to produce would all have to be translated into German at enormous up-front cost to the plaintiffs. *See* § 184 Gerichtsverfassungsgesetz [Act Constituting the Courts] [GVG] (Ger.).

3. Measures to assist impoverished plaintiffs come too late in the process and are entirely inadequate to cover the risk of litigation.

Plaintiffs in Germany can be granted leave to proceed *in forma pauperis*, but this leave does not cover two preliminary hurdles: first, legal aid (*Prozesskostenhilfe*) itself is only available after plaintiffs survive a preliminary examination of the merits and the court declares that the action has the "prospect of success": §§ 114, 117–118 ZPO. For complex cases of serious human rights violations, the assistance of counsel will be required to meet even this threshold, making litigation inaccessible to non-European plaintiffs living in poverty. Secondly, German law only enables the court to grant plaintiffs legal aid for their own costs, not those of the defendants. Non-European plaintiffs are still required to pay the same amount of deposit in cash under § 110 ZPO whether or not they are eligible for or receive legal aid. *See* §§ 114 *et seq.* ZPO.

Furthermore, the unavailability of class actions under German procedural law and the limited scope of the joinder provisions mean that

each victim would have to seek compensation individually and would be individually subject to the requirement to pay the aforementioned security. In the wrongful death claims at the core of this case, each of the individual claimants, many of them living in poverty, could be required to pay as much as roughly € 30,000 to proceed. *See* § 59 ZPO; § 39 *et seq.* Gerichtskostengesetz [Court Costs Act] [GKG] (Ger.); §§ 22 and 23 Rechtsanwalts-vergütungsgesetz [Attorneys' Compensation Act] [RVG] (Ger.); and Baumbach *et al.*, *ZPO*, § 59 *et seq.*

II. The Ninth Circuit's personal jurisdiction test, if applied correctly, protects international trade and investment and is in line with U.S. foreign policy.

In their briefs as amici curiae in support of the petitioners, Viega GmbH & Co. KG, the Federation of German Industries, and the Association of German Chambers of Industry and Commerce raise the spectre of international investors being deterred from investment in the United States as a result of the Ninth Circuit's agency test: *See Bauman*, 644 F.3d at 920–24, Brief for Viega GmbH & Co., *et al.* as Amicus Curiae 16–17 [hereinafter *Viega Br.*], Brief for the U.S. Chamber of Commerce, *et al.* as Amicus Curiae 18 *et seq.* [hereinafter *Chamber of Commerce Br.*] However, proper application of the Ninth Circuit's test only covers systematic and continuous business activity amounting to a corporation being essentially at home in the jurisdiction. It would not cover the facts in the *Viega* litigation, *Waterfall*

Homeowners Ass'n v. Viega, Inc., et al., 2:11-cv-01498-RCJ-GWF (D. Nev.), where a homeowner's association brought suit against a German company for claims arising from defective plumbing parts, or other situations where a foreign corporation merely invested in a U.S. jurisdiction.[7]

Moreover, unlike in *Bauman*, the *Viega* plaintiffs do not allege that the "defective high-zinc-content [ ] brass fittings and potable-water-delivery systems," Viega Br. 10, in that case violate their human rights or constitute a crime against humanity for which no other court will accept jurisdiction.

A. The *Viega* litigation raises a distinct and more attenuated claim of general jurisdiction than *Bauman*.

The parent company defendant in this case, Daimler AG, is the successor-in-interest to DaimlerChrysler, which existed at the time of service of process as a joint German and American corporation with operational headquarters and CEOs in both the United States and Germany. *See Bauman*, 644 F.3d at 912–13, 914 n. 6. In substance, this is a case of United States courts

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[7] The parties in *Viega* are currently awaiting the outcome of a decision of the Supreme Court of Nevada concerning certain aspects of state law including jurisdiction arising out of mere investment by a parent company. *See Viega GmbH et al. v. Eighth Judicial Dist. Court (Aventine-Tramonti Homeowners' Assoc.)*, No. 59976 (Nev. filed Jan. 4, 2012); *Viega GmbH et al. v. Eight Judicial Dist. Court (La Paloma Homeowners' Assoc.)*, No. 60015 (Nev. filed Jan. 10, 2012).

exercising jurisdiction over a United States company for the conduct of one of its subsidiaries abroad.

In the *Viega* litigation, the Nevada District Court invoked both *Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S. Ct. 2846 (2011), and *Bauman, supra,* in its jurisdiction determination, considering itself bound by both decisions. *Waterfall Homeowners Ass'n v. Viega, Inc.*, 2:11-cv-01498-RCJ-GWF, 2012 U.S. Dist. LEXIS 167875, at *9–10 (D. Nev. Nov. 26, 2012). However, a proper application of both cases adequately protects companies operating as mere investors in the United States.

In *Goodyear*, the parent company conceded that North Carolina could exercise jurisdiction over it based on its systematic contacts with that state. The issue in *Goodyear* was whether North Carolina could exercise general jurisdiction over the parent company's foreign subsidiaries, which had no contact with the forum state other than their products entering its stream of commerce through no intended actions of their own. *See Goodyear*, 131 S. Ct. at 2852–2853. In *Viega*, the issue at hand is whether the forum state can exercise general jurisdiction over a foreign parent company that has a subsidiary in that state. Viega Br. 10–11. However, the mere presence of a subsidiary in a territory was not the basis of the Ninth Circuit's test in *Bauman* and is not being advanced before this Court as an appropriate basis for the exercise of general jurisdiction. All of the potential bases for exercising personal jurisdiction in U.S. courts are more stringent, and international investors would

still be protected from liability based entirely on bare ownership of a subsidiary with no further systematic or continuous contacts with a U.S. jurisdiction.

Unlike Mercedes-Benz USA and Daimler AG, Viega's contacts with Nevada are neither systematic nor continuous. Whereas Viega's brief explains that its contacts are limited to the ownership of a single subsidiary in a state where there is no authorized person to accept service of process, Viega Br. 11–12, Daimler maintains permanent counsel in California. *Bauman*, 644 F.3d at 925. Viega's Nevadan subsidiary distributes and sells products manufactured not by Viega but by a third party. Viega Br. 10. Viega neither employs nor controls any distribution system in Nevada, nor does it engage in advertising, solicitation, or sales activities there. By contrast, the Ninth Circuit in *Bauman* examined in detail the close nature of the relationship between Daimler's California subsidiary and the German-American parent, as well as the foreign parent's overall contacts with California.

B. There is nothing unclear or deterrent for foreign corporations about "doing business" as a basis for jurisdiction.

Amici agree with the United States that, in the determination of whether the exercise of general jurisdiction is justified and reasonable, a parent company's direct contact with the forum jurisdiction weighs more heavily than contacts merely attributed to the parent company through one of its subsidiaries in the forum state. Brief for the United

States as Amicus Curiae 16–17. But both types of contacts play a role, and Daimler has extensive contacts with California under both analyses.

Daimler profits enormously from its contacts with California, a fact which is overlooked or downplayed by the petitioners and the United States in its brief amicus curiae. U.S. Am. Br. 17. Daimler AG draws 2.4% of its global revenue from California alone. *See Bauman*, 644 F.3d at 914. Apart from Mercedes-Benz USA, Daimler maintains another wholly-owned, tightly-controlled subsidiary domiciled in California, Mercedes-Benz Research and Technology North America, Inc. *Id.*, at 925. And, as mentioned, Daimler retains permanent counsel at all times in California.

Daimler long ago crossed the line at which every corporation, American or foreign, can expect to encounter the general jurisdiction of a forum with which it has such extensive contacts. Daimler reserved the right to control every aspect of Mercedes-Benz USA's operations. *See Bauman*, 644 F.3d at 924–25. Daimler routinely avails itself of California courts to pursue intellectual property and regulatory cases. *See id.*, at 925; *see also, e.g.*, *DaimlerChrysler AG v. Feuling Advanced Techs.*, 276 F. Supp. 2d 1054 (S.D. Cal. 2003). When the claims in question concern crimes against humanity and violations of internationally-recognized human rights, Daimler should not be permitted to hide from a trial on the merits of such claims behind a fig-leaf subsidiary.

The very purpose behind *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and

Goodyear, *supra*, was to give sufficient notice to corporations whose commercial activities extend to a particular jurisdiction about the point at which those activities intensify so as to subject the corporation to general personal jurisdiction there. The standards for parent companies in International Shoe and Goodyear are entirely predictable and fair. Even in light of both cases, companies have continued to do business across state and international borders in and with the United States in the nearly seventy years since *International Shoe* was decided. The Federation of German Industries and the Association of German Chambers of Industry and Commerce are thus unconvincing in arguing that a straightforward application of existing American jurisdictional rules would scare off potential foreign trade partners.

C. Making foreign corporations who seek access to the U.S. market adhere to certain international human rights standards does not undermine U.S. foreign policy.

The Federation of German Industries and the Association of German Chambers of Industry and Commerce additionally raise in their amicus curiae brief the potential detrimental effect that the exercise of jurisdiction over the petitioners could have on the foreign relations of the United States. Chamber of Commerce Br. 20-22; Brief for Economiesuisse, *et al.* as Amicus Curiae 4 *et seq.* This argument has little merit. As asserted above, this case should be viewed as American courts exercising jurisdiction over an American company, since Daimler was at the time of service of process

DaimlerChrysler, a joint German and American corporation. Even if the litigation is viewed as the exercise of jurisdiction over a German corporation, it is consistent with the expressed foreign policy of Congress and the President, and the German government has never objected to the proceedings.

The United States requires companies seeking access to its markets – even foreign companies – to comply with certain human rights and corporate governance standards worldwide as a condition of that market access. *See, e.g.*, Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249B); *Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n*, Civil Action No. 13-cv-635 (RLW), 2013 U.S. Dist. LEXIS 102616 (D.D.C. Jul. 23, 2013) (affirming the constitutionality of the Conflict Minerals Rule promulgated by the Securities and Exchange Commission pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)). Under the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §78dd-1 *et seq.*, the United States routinely enforces anticorruption standards against foreign corporations doing business in third jurisdictions simply because they are listed on U.S. stock exchanges. *See, e.g.*, Criminal Information, *United States v. Marubeni*, 12-cr-022 (S.D. Tex. Jan. 17, 2012). The United States Government has even proceeded against Daimler in civil litigation for bribery in Europe, Africa, and Asia. *See* Compl., *Sec. & Exch. Comm'n v. Daimler AG*, No. 10-cv-473 (D.D.C. Apr. 1, 2010).

It defies logic to suggest that United States foreign policy countenances the holding of Daimler

and similarly situated corporations to the letter of its anticorruption laws worldwide but that that same foreign policy would be undermined by allowing the application of existing tort law and jurisdictional rules against international corporations doing substantial business in the United States.

CONCLUSION

For the foregoing reasons, as well as those offered by the respondent, the Ninth Circuit's decision should be affirmed.

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August 26, 2013

APPENDIX

Appendix – List of *Amici Curiae* German Legal Experts

Alexander Graser holds a chair of public law and policy at the University of Regensburg, Germany. He is also a fellow of the Hertie School of Governance in Berlin. His research is in the fields of comparative constitutional law and theory, fundamental rights, and social regulation.

Miriam Saage-Maass is the Deputy Legal Director and the Program Coordinator for Business and Human Rights at the European Center for Constitutional and Human Rights (ECCHR), an independent, non-profit legal organization dedicated to protecting civil and human rights. The ECCHR also works to ensure that transnational companies are held to account for their operations in third countries where their operations lead to or are complicit in serious human rights violations. Her work concentrates on building and filing strategic litigation cases for human rights violations and training human rights organizations, lawyers, and communities in countries of the global South negatively affected by transnational corporations.

Christopher Schuller is a human rights lawyer in Berlin, where he is a legal advisor at the German Institute for Human Rights. He is Assistant Editor of the *Oxford University Comparative Law Forum* and has held lecturerships at the Humboldt University of Berlin and the University of Osnabrück.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

JUL 3 - 2013

No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,
Petitioner,

v.

BARBARA BAUMAN, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on the issue presented in this case, namely whether the Due Process Clause of the Fourteenth Amendment, as interpreted most recently by this Court in *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851 (2011), should allow a court to exercise general personal jurisdiction over a foreign corporation solely because it has a subsidiary conducting business on its behalf in the forum State.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), NELF also states that, on May 28 and on May 30, 2013, counsel for petitioner and counsel for respondents respectively filed with this Court a general written consent to the filing of amicus briefs, in support of either or neither party.

AIM is a 97-year-old nonprofit association, with over 5,000 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

NELF and AIM are committed to the preservation of the due process protections afforded businesses when they are sued in unanticipated, remote, and inconvenient fora. In this connection, NELF and AIM recently filed an amicus brief in *Walden v. Fiore*, *cert. granted*, 133 S. Ct. 1493 (Mar. 4, 2013) (No. 12-574), arguing for reasonable due process limits on a court's exercise of specific jurisdiction over an out-of-state defendant sued for intentional torts. Moreover, NELF has filed many other amicus briefs before this Court, advocating successfully for protections afforded businesses under the Constitution and federal law.[2]

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[2] *See, e.g.*, *Vance v. Ball State*, 2013 WL 3155228 (Jun. 24, 2013) (employer vicariously liable for hostile work environment under Title VII only when harassing employee is capable of taking tangible employment actions against victim); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 2013 WL 3155234 (Jun. 24, 2013) (standard of but-for causation applies to Title VII retaliation claims); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (Federal Arbitration Act requires enforcement of class action waivers in arbitration of federal statutory claims); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preempts State law requiring class arbitration as condition of enforcing consumer arbitration agreements); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011)

In this case, NELF and AIM support the petitioner in arguing that the Ninth Circuit has violated due process by exercising general jurisdiction over a foreign corporation based solely on the forum connections of its indirect subsidiary. Under this Court's clear precedent, general jurisdiction should not lie in this case, because petitioner has observed all of the corporate formalities, by using the services of a subsidiary as a *separate* legal entity to conduct business on its behalf in the forum State.

Amici are interested in this case because many of their corporate supporters may also have subsidiaries or affiliates doing business in the Ninth Circuit on their behalf as separate legal entities. Under the Ninth Circuit's approach, amici's supporters could face the same fate as petitioner and be subject to the exercise of general jurisdiction by a remote court of that circuit, based solely on the existence of such subsidiaries or affiliates. This Court has long recognized that, in the ordinary parent-subsidiary relationship, where the corporate formalities are observed, the law generally treats the parent and subsidiary as two separate legal entities, even though the subsidiary may be conducting business on the parent's behalf and may be subject to a certain degree of parental oversight.

Due process, in turn, gives legal effect to the corporate defendant's reasonable expectations. If the defendant structures its business relationship with its subsidiary carefully to preserve this corporate separateness, it should not be haled into

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(First Amendment protects sale and use of prescriber-identifiable data).

court in a distant and unanticipated forum based solely on its subsidiary's activities there, to defend claims that are entirely unrelated to those activities.

The Ninth Circuit's decision and "agency" test of derivative general jurisdiction contravene this Court's clear precedent by negating the principle of corporate separateness. In so doing, the lower court has defeated the corporate defendant's reasonable expectations as to where it may and may not be sued based on its careful compliance with corporate formalities. The Ninth Circuit's decision thus violates Due Process and should be reversed.

For these and other reasons provided below, amici believe that their brief would provide an additional perspective to aid this Court in deciding the issue of personal jurisdiction presented in this case.

SUMMARY OF ARGUMENT

At issue in this case is whether the Due Process Clause of the Fourteenth Amendment permits a court to exercise general personal jurisdiction over a foreign corporation merely because it has a subsidiary doing business on its behalf in the forum State. The Ninth Circuit has so held, based on the theory that the subsidiary conducted its business in the forum State as an "agent" of the parent corporation.

The lower court's decision and "agency" test offend due process. General jurisdiction can only lie if the foreign parent corporation has made itself "essentially at home" in the forum State by engaging in sufficiently "continuous and systematic" contacts

there. The petitioner has not established any such quasi-domiciliary relationship with the forum State in this case. To the contrary, it has carefully avoided creating any such relationship, by observing all of the corporate formalities that separate itself from its subsidiary as two distinct legal entities. This Court long has recognized that, in such a parent-subsidiary relationship, the subsidiary remains a separate entity under the law, even though it is conducting business on the parent's behalf and is, of necessity, subject to a certain degree of parental oversight. So long as the corporate form is observed, the subsidiary's contacts should not be imputed to the parent.

Due process should require a court to honor a foreign corporation's diligent observance of the corporate form, here by declining to exercise general jurisdiction over that corporation based solely on its subsidiary's forum connections. This is so because due process gives legal effect to the corporate defendant's reasonable expectations. If the defendant structures its inter-corporate relationships expressly to maintain this separateness, it should not be haled into a distant and unanticipated forum based solely on its subsidiary's forum connections, to defend claims that are entirely unrelated to those connections.

This Court has recognized only one limited exception to the principle of corporate separateness, which is inapplicable here. That exception is when the parent has so completely disregarded the corporate form that a court may do the same, by piercing the corporate veil. As the Ninth Circuit has acknowledged here, this case does *not* present any such exceptional circumstances warranting a court

to pierce the corporate veil between parent and subsidiary.

Despite this Court's clear precedent honoring corporate separateness, the Ninth Circuit has nonetheless imputed all of the subsidiary's forum contacts to the foreign parent, based on its "agency" theory of derivative corporate personal jurisdiction. But this so-called "test" would subject *any* foreign parent to general jurisdiction because it merely *describes* the ordinary, arms-length relationship between a parent and its subsidiary. As this Court has recognized, the ordinary parent-subsidiary relationship will necessarily entail a certain degree of parental oversight. This alone does not negate corporate separateness. So long as the parent observes the corporate formalities, it may use the services of a subsidiary to sell its goods, or conduct some other business on its behalf in the forum State, without risking judicial disregard of the corporate form for jurisdictional purposes.

In effect, the Ninth Circuit has penalized the petitioner for having made the legally permissible and economically sound decision to facilitate its overseas operations through a legally separate subsidiary, rather than through its own officers. The Court has rejected any such judicial disregard of the parent-subsidiary relationship.

In short, the Ninth Circuit's "agency" test, both on its face and as applied to the facts of this case, contravenes this Court's clear precedent honoring the principle of corporate separateness in cases involving the parent-subsidiary relationship. As a result, the lower court's test would impute jurisdictional contacts where frequently *none* should

be imputed at all, as in this case. Both the test and its application in this case should fail altogether under this Court's demanding, quasi-domiciliary standard under the Due Process Clause for the exercise of general jurisdiction over a foreign corporate defendant.

ARGUMENT

I. GENERAL JURISDICTION SHOULD NOT LIE AGAINST A FOREIGN CORPORATION MERELY BECAUSE IT HAS A SUBSIDIARY DOING BUSINESS ON ITS BEHALF IN THE FORUM STATE.

At issue in this case is whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits a court to exercise general personal jurisdiction over a foreign corporation solely because it has a subsidiary doing business on its behalf in the forum State.[3] The Ninth

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[3] The Fourteenth Amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. While this case concerns the constitutional limits on a federal court's exercise of personal jurisdiction, it is the Due Process Clause of the Fourteenth Amendment, and not the Fifth Amendment, that applies here. This is so because, absent a federal statute to the contrary, a federal district court may only exercise personal jurisdiction to the same extent as a State court of general jurisdiction in the State where the district court sits. *See* Fed. R. Civ. P. 4(k)(1)(A), (C). *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985) ("The question presented is whether this exercise of long-arm jurisdiction [by a federal district court] offended traditional conceptions of fair play and substantial justice embodied in the Due Process Clause of the Fourteenth Amendment.") (citation and internal quotation marks omitted).

Circuit has so held. Petitioner DaimlerChrysler AG ("Daimler AG") is a German corporation that manufactures Mercedes-Benz cars in Germany. Daimler AG has an indirect corporate subsidiary, Mercedes-Benz USA ("MBUSA"), which purchases Daimler AG's cars in Germany for distribution in California.[4] Daimler AG has observed all of the corporate formalities that separate itself from MBUSA. *See Bauman v. DaimlerChrysler Corp.*, 644 F.3d 904, 914, 920 (9th Cir. 2011). Nonetheless, the Ninth Circuit has concluded that MBUSA was an "agent" of Daimler AG for jurisdictional purposes. According to the lower court, all of MBUSA's California contacts must be imputed to Daimler AG, thereby establishing "vicarious" general jurisdiction over Daimler AG in that State. *See Bauman*, 644 F.3d at 920-21.

The Ninth Circuit's decision violates Due Process. General jurisdiction should not lie because Daimler AG has not made itself "essentially at home" in the forum State by engaging in sufficiently "continuous and systematic" contacts there. "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations v. Brown*,

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[4] Daimler AG does not own MBUSA. Instead, when this lawsuit was filed, MBUSA was a wholly-owned subsidiary of DaimlerChrysler North America Holding Corporation, which, in turn, was a wholly-owned subsidiary of DaimlerChrysler AG (now known as Daimler AG). *Bauman v. DaimlerChrysler Corp.*, 644 F. 3d 904, 913 (9th Cir. 2011).

131 S. Ct. 2846, 2851 (2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

It is important to bear in mind that general jurisdiction extends to any and all claims against the foreign defendant that do not arise from the defendant's activities in the forum State. *See Goodyear*, 131 S. Ct. at 2851, 2853. Since the forum State has no direct interest in the claim itself, the exercise of general jurisdiction is justified only when the corporate defendant has established a *special relationship* with that State, akin to an individual defendant's domicile. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as *at home*." *Goodyear*, 131 S. Ct. at 2853-54 (emphasis added). Accordingly, to satisfy this quasi-domiciliary requirement for the exercise of general jurisdiction over a corporate defendant, due process requires the defendant's forum contacts "[to be] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Goodyear*, 131 S. Ct. at 2853 (quoting *Int'l Shoe*, 326 U.S. at 318).

Thus, the issue here is whether Daimler AG, with no "continuous and systematic" connections of its own in California, can nevertheless be deemed to be "at home" in California based solely on the forum activities of MBUSA, its indirect subsidiary, to defend claims that are entirely unrelated to MBUSA's forum activities.

Due process bars the exercise of general jurisdiction over Daimler AG in California because it

has not made itself "essentially at home" in that State. To the contrary, Daimler AG has taken all available and permissible steps to *avoid* establishing any such quasi-domiciliary relationship with the State of California. Daimler AG has observed all of the corporate formalities by using the services of MBUSA as a *separate* legal entity to engage in forum operations on its behalf. Under those circumstances, this Court has long recognized the foundational principle of corporate separateness, which treats the parent and subsidiary, especially the *indirect* subsidiary, as two separate legal entities:

> A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. . . . A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, *it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary.*

Dole Food Co. v. Patrickson, 538 U.S. 468, 474-75 (2003) (emphasis added).

Because the parent and subsidiary are structured and maintained as two separate legal entities, as in this case, the actions of the subsidiary should not be imputed to the parent. Therefore, jurisdiction cannot lie against the foreign parent based solely on its subsidiary's forum activities, such as when, as here, the subsidiary purchases the parent's goods in another jurisdiction for distribution in the forum State. In fact, this Court, when faced with substantially similar jurisdictional facts,

answered in the negative "[t]he question . . . whether the *corporate separation carefully maintained* must be ignored in determining the existence of jurisdiction." *Cannon Mfg. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925) (no jurisdiction over foreign parent based on subsidiary's purchase of parent's goods in foreign jurisdiction for distribution in forum State) (emphasis added).[5]

This principle of corporate separateness "is a general principle of corporate law *deeply ingrained in our economic and legal systems*[:] . . . a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States. v. Bestfoods*, 524 U.S. 51, 61 (1998) (emphasis added). Corporations such as Daimler AG have structured their business relationships carefully in reliance on this deeply ingrained principle of corporate separateness. This principle allows the corporation to remove itself from the commercial enterprises it owns, in this case only indirectly, and

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[5] While *Cannon* was apparently not decided under the Due Process Clause, and was decided before *International Shoe*, *Cannon* nevertheless framed the jurisdictional issue consistently with *International Shoe*'s minimum-contacts analysis (albeit using older jurisdictional terminology, such as "doing business" and "presence"), *and* consistently with the very issue raised in this case: "The main question for decision is whether, at the time of the service of process, [the parent corporation] defendant was doing business within the state in such a manner and to such an extent as to warrant the inference that it was present there." *Cannon*, 267 U.S. at 334-35. Therefore, despite its pre-*International Shoe* status, *Cannon* is nevertheless highly instructive precedent on the issue presented here--whether a parent corporation can be amenable to general jurisdiction based solely on its subsidiary's forum contacts.

thereby control its exposure to liability *and* personal jurisdiction.

The Due Process Clause, in turn, gives legal effect to the corporation's reasonable expectation that its diligent observance of corporate formalities should protect it from amenability to suit in a distant and unanticipated forum. "The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to *structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.*" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (emphasis added). *See also id.* (due process inquiry determines whether "the defendant's conduct and connection with the forum State are such that he should *reasonably anticipate* being haled into court there.") (emphasis added).

Accordingly, due process should require a court to honor a corporation's compliance with corporate formalities by declining to exercise general jurisdiction over that corporation based solely on its subsidiary's forum contacts. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) ("It does not of course follow from the fact that jurisdiction may be asserted over [the wholly owned subsidiary] Hustler Magazine, Inc., that jurisdiction may also be asserted over either of the other defendants [including the subsidiary's holding corporation]; . . . *Each defendant's contacts with the forum State must be assessed individually.*") (emphasis added).

This Court has recognized only one limited exception to the principle of corporate separateness,

which is inapplicable here. That limited exception is when the parent has so completely disregarded the corporate form that a court may do the same, by piercing the corporate veil. "The veil separating corporations and their shareholders may be pierced in some circumstances . . . . The doctrine of piercing the corporate veil, however, is the *rare exception*, applied in the case of fraud or certain other *exceptional circumstances*." *Dole Food Co.*, 538 U.S. at 475 (emphasis added). As the Ninth Circuit has acknowledged here, this case does *not* present any such exceptional circumstances warranting a court to pierce the corporate veil between Daimler AG and MBUSA. *See DaimlerChrysler*, 644 F.3d at 920 (noting inapplicability of "alter ego" theory of imputing subsidiary's jurisdictional contacts to parent).

Despite this Court's adherence to the principle of corporate separateness, and despite the clear absence in this case of any basis to disregard the corporate form, the Ninth Circuit has nonetheless imputed all of MBUSA's California contacts to Daimler AG for jurisdictional purposes. The lower court has based its decision on a novel "agency" theory of derivative general jurisdiction, which disregards the corporate form whenever (1) the subsidiary's activities are "sufficiently important" to the parent such that the parent would have to carry on those activities by other means in the subsidiary's absence, and (2) the parent has reserved the "right to control" aspects of the subsidiary's operations. *Bauman v. DaimlerChrysler*, 644 F.3d at 920, 922.

But this so-called "test" for disregarding the corporate form, based on the subsidiary's "sufficient importance" to the parent and the parent's "right to

control" certain aspects of the subsidiary's operations, merely *describes* the ordinary, arms-length relationship between any parent and its subsidiary. And this Court has recognized that, in the typical parent-subsidiary relationship, the parent and subsidiary remain separate entities under the law, even though the subsidiary is conducting business on the parent's behalf and is subject to a certain degree of parental oversight. *See Bestfoods*, 524 U.S. at 72 (parental oversight of subsidiary, consistent with parent's investor status, does not give rise to CERCLA liability); *Cannon*, 267 U.S. at 35 (no jurisdiction over foreign parent based on subsidiary distributor's forum connections, even though parent exercised substantial control, because parent maintained corporate form).

After all, a subsidiary is established precisely to advance the economic interests of the parent, such as by distributing the parent's products in a remote market, as in this case. It is a truism that the subsidiary's operations are "sufficiently important" to the parent, such that the parent would need to continue the subsidiary's efforts by some other means in the subsidiary's absence. The "right to control" is also a standard feature of the parent-subsidiary relationship. The parent needs to reserve a certain degree of oversight to ensure that the subsidiary is serving the parent's interests consistently with the parent's corporate policies. As this Court has recognized, a parent corporation may oversee the operations of its subsidiary "consistent[ly] with the parent's investor status, such as [by] *monitoring* of the subsidiary's performance, *supervision* of the subsidiary's finance

and capital budget decisions, and *articulation* of general policies and procedures," without incurring liability. *Bestfoods*, 524 U.S. at 72 (citation and internal quotations omitted) (emphasis added).

But it is precisely these ordinary indicia of parental oversight, quoted above, that the Ninth Circuit has invoked to justify the exercise of general jurisdiction over Daimler AG. *See Bauman*, 644 F.3d at 924. The Ninth Circuit's decision and "agency" test simply contravene this Court's precedent recognizing the economic realities that inform the ordinary parent-subsidiary relationship. So long as the parent observes the corporate form, it may use the services of a subsidiary to sell its goods, or conduct some other business on its behalf, without risking judicial disregard of the corporate form for jurisdictional purposes. *See Cannon*, 267 U.S. at 335 (refusing to disregard parent-subsidiary separateness for jurisdictional purposes, even though parent exerted control over wholly owned subsidiary "in substantially the same way . . . as it does over [its own] selling branches or departments[,] [because] . . . [t]he existence of the [subsidiary] as a distinct corporate entity is . . . in all respects observed.").

In fact, *Cannon* expressly rejected the notion that a subsidiary distributing the parent's goods in the forum State, under substantially similar circumstances as here, is an "agent" of the parent for jurisdictional purposes. *See Cannon*, 267 U.S. at 335 (in-state subsidiary was "the instrumentality employed to market [the foreign parent's] products within the state; but it *does not do so as defendant's*

agent. [Instead, the in-state subsidiary] buys from the defendant and sells to dealers.") (emphasis added).

In effect, the Ninth Circuit has penalized Daimler AG for having made the legally permissible and economically sound decision to facilitate its overseas operations through a legally separate subsidiary, rather than through its own officers. "Ordinarily, [however,] a corporation which chooses to facilitate the operation of its business by employment of another corporation as a subsidiary *will not be penalized* by a judicial determination of liability for the legal obligations of the subsidiary." *Bestfoods*, 524 U.S. at 61 (citation and internal quotation marks omitted) (emphasis added). Just as the parent is not ordinarily held liable for the subsidiary's actions, so too should due process forbid a court from exerting general jurisdiction over the parent based on its subsidiary's actions. The Ninth Circuit's exercise of general jurisdiction over Daimler AG is based on a disregard of the parent-subsidiary relationship, which this Court has clearly rejected.

In sum, the Ninth Circuit's virtually limitless "agency" test, both on its face and as applied to the facts of this case, contravenes this Court's clear precedent honoring the principle of corporate separateness in the standard parent-subsidiary relationship. As a result, the lower court's test would impute general jurisdictional contacts where frequently *none* should be imputed at all, as in this case. Accordingly, both the test and its application in this case fail altogether under this Court's

demanding, quasi-domiciliary standard for the exercise of general jurisdiction over a foreign corporate defendant. *See Goodyear*, 131 S. Ct. at 2851 (requiring sufficiently "continuous and systematic" contacts with forum State "as to render [foreign corporation] essentially at home in the forum State"). The Ninth Circuit's decision and "agency" test further offend due process by subverting a corporate defendant's reasonable expectation that the diligent observance of corporate formalities should protect it from being haled into a remote and inconvenient forum. See *World-Wide Volkswagen Corp.*, 444 U.S. at 297. Therefore, general jurisdiction should not lie against Daimler AG in this case.

CONCLUSION

For the reasons stated above, NELF and AIM respectfully request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 104 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 1,000 briefs as amicus curiae in both state and federal courts, including one hundred in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as an Appendix.[1]

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[1] Pursuant to Sup. Ct. R. 37.6, amicus curiae PLAC affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The Due Process Clause provides threshold protections to those who have been sued in United States courts. Among these are (1) permitting "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); and (2) addressing separately each defendant's contacts with the forum. *See Rush v. Savchuk*, 444 U.S. 320, 332 (1980); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984). The Ninth Circuit's opinion[2] in this case runs afoul of both.

The Ninth Circuit relied upon its version of "agency" as the sole justification to impute general jurisdiction over MBUSA to Daimler AG. It thereby required a German manufacturer to litigate a dispute with Argentinean plaintiffs in the forum state of a domestic U.S. distributor who had nothing whatever to do with Plaintiffs' claim. The court of appeals identified no connection between the forum, the parties or the dispute.

The imputed jurisdiction approved by the Ninth Circuit has ominous implications for PLAC's members, already the frequent targets of forum shopping by plaintiffs searching for deep pockets, because so many

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consenting to the filing of this brief have been filed with the Clerk's Office.

[2] Unless otherwise stated herein, the "Ninth Circuit's opinion" refers to its second opinion, reconsidering and vacating its original decision. 644 F.3d 909 (9th Cir. 2011). Pet. App. 1a.

manufacturers use domestic distributors when marketing their products elsewhere. These manufacturers frequently use agreements similar to that used by Daimler AG and MBUSA in the present case. The type of relationship between this foreign manufacturer, Daimler AG, and this domestic distributor, Mercedes-Benz USA ("MBUSA"), is therefore not uncommon. There is no dispute that they are separate corporate entities. Nor is there any suggestion of harm arising from any illegal or fraudulent misuse of their corporate structure. Yet the Ninth Circuit's decision holds that a German corporation may be sued in California for harm allegedly sustained by Argentineans in South America.

The Ninth Circuit's theory of imputed personal jurisdiction conflicts with the Due Process Clause. Indeed, the court below assumed, without analysis, that a finding of an agency relationship would automatically satisfy the Due Process Clause. It then took an odd definition of agency to justify imputed jurisdiction. Barely over a month after the Ninth Circuit's decision, however, this Court strongly indicated that merging a parent and subsidiary for jurisdictional purposes requires an inquiry that is "comparable to the corporate law question of piercing the corporate veil." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011).

The criteria the Ninth Circuit applied to determine the existence of this purported "agency" are so vague, and so overbroad, that they could potentially ensnare any multinational manufacturer in virtually any forum a plaintiff might choose. Its approach circumvented this Court's requirement that each defendant's contacts with the forum be assessed separately. *Rush, supra,*

Keeton, supra. If upheld, the Ninth Circuit's decision would make it virtually impossible for "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen, supra.* Virtually any local distributor could be treated as the agent of any foreign manufacturer. Likewise, virtually any American manufacturer who sought to engage in business in a foreign country via a local distributor could suffer a similar fate in distant foreign courts. Such a rule could cripple international commerce.

Such a result cannot stand; it does not afford due process to manufacturers such as this defendant.

III. ARGUMENT

A. A Distribution Agreement Such as That Between Daimler AG and MBUSA is Common.

The linchpin of the Ninth Circuit's opinion is the distribution agreement between Daimler AG and MBUSA. The court concluded that this agreement made MBUSA an agent of Daimler AG. Consequently, the court imputed MBUSA's jurisdictional status to Daimler AG. This distribution agreement is hardly unusual; however, manufacturers such as Daimler AG typically lack expertise in the fields in which a local distributor works. A German manufacturer would struggle to determine whom to appoint as dealers in Mississippi or New Mexico; how to comply with OSHA or ADA; what wage and hour requirements apply; the idiosyncrasies of American consumers; the kinds of advertisements most likely to resonate with the local

customer base; what federal, state, and local laws require, and countless other responsibilities.

Few manufacturers would or could dare to undertake those tasks themselves in a foreign land in the absence of a domestic distributor. Indeed, manufacturers of many kinds of products choose to establish subsidiary distributorships in foreign markets in which they seek to sell their products. Some contract with independent distributors rather than step into the American distribution business themselves. In either case, they understandably need to find a way to allocate responsibilities between their distributors and themselves.

These relationships serve important and mutually-beneficial purposes. Daimler AG is a designer and manufacturer of motor vehicles. The core work force of such a manufacturer typically consists of engineers and machinists and others who work in product development, design and assembly. Such a company is unlikely to have much knowledge of the laws, customs, culture, buying habits and preferences of domiciliaries of another country.[3]

By contrast, MBUSA is an American distributor of vehicles manufactured by Daimler and sold within the United States. Its distinct functions require the hiring of personnel with different job requirements, skills, and talents. For example, a U.S. distributor has a far better

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[3] *See, e.g.*, Robert L. Shook, *Honda: An American Success Story*, 26-38 (1988), discussing Honda's early challenges in understanding the differences between Japanese and American culture, differences in the uses of motorcycles, and the reasons the Japanese company formed its own US-based distributorship, and ultimately achieved success in the United States.

perspective when tackling daunting legal issues including:

- Licensing requirements in each of the 50 states;
- US federal and varying state and local tax reporting and payment requirements;
- Potential taxability of foreign revenues by U.S. federal, state and local governments;
- Compliance with varying state laws protecting independent auto dealers.
- U.S. Customs and Border Protection requirements for importation of vehicles and equipment; and,
- U.S. Department of Transportation and Environmental Protection Agency declarations certifying compliance with federal safety, bumper, theft and clean air regulations.

As noted in Petitioner's Brief, pp. 4-5, 29-31, the distribution agreement between Daimler AG and MBUSA sensibly allotted all rights and responsibilities between the two entities. The court of appeals emphasized the aspects of the agreement that appeared to favor Daimler AG. 644 F.3d at 914-917. However, even as to these issues, responsible manufacturers understandably seek to ensure that whatever a distributor does on its behalf does not compromise the manufacturer's hard-earned reputation; that the distributor complies with all laws in the country where it operates; handles its finances properly; and protects the manufacturer's intellectual property.

The same terms also work to the benefit of the distributor. It, too, reaps benefits from the integrity of the brand; from cooperation with regulators; from

remaining solvent so it can discharge its core functions; and from the manufacturer's intellectual property. Without these, the distributor is hard pressed to sell its product. The agreement puts the distributor in the best position to serve the market in which it operates and to compete effectively with rival brands.

The terms of the distribution agreement do little more than this. Indeed, a manufacturer would be derelict in its own duties to its shareholders, regulators, and customers if it did less. The agreement used by Daimler AG and MBUSA is consistent with those used by many manufacturers and distributors.

It is a vast oversimplification to suggest that the mere existence of detailed contractual requirements somehow makes the distributor an agent of the manufacturer. In an analogous circumstance, see *United States v. Orleans*, 425 U.S. 807, 816 (1976) (government contracts, despite containing "specific and precise conditions" and regulations "aimed at assuring compliance with goals," did not convert private contractors into government agents for purposes of tort liability); *Logue v. United States*, 412 U.S. 521, 527 (1973) (Modern common law distinguishes between the servant or agent relationship and that of independent contractor based on the absence of authority in the principal "to control the *physical conduct of the contractor in performance of the contract*.") (Emphasis supplied).

Cultural understanding is crucial to the success of a manufacturer's development of a market for its product in foreign country. A manufacturer has good reason to leave the day-to-day decision making concerning the details of distribution, marketing and sales of the product in the hands of a domestic company

that is more likely to understand what will resonate with its customers.[4]

B. The "Agency" Test For Personal Jurisdiction Does Not Satisfy the Demands of Due Process.

The Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472.

Yet agency theory rarely provides any predictability when applied to jurisdictional disputes. Even in the limited form in which it was conceived, applying agency theory to adjudicate jurisdictional disputes is rightly criticized as "vague and ill-defined principally because it is based on a distorted application of the traditional law of agency." Michael G. Albano, *Agency as a Means of Obtaining Jurisdiction in New York over Foreign Corporations: A Failed Theory*, 20 Brook. J. Int'l L. 169, 197 (1993).[5]

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[4] Conversely, a company acts at its peril if it mistakenly overlooks the nuances of local language or culture. One well-known example, perhaps urban myth, illustrates foreign companies' struggles when trying to adapt their American-made slogans for use in China. Pepsi's slogan, "Come alive with Pepsi!" reportedly became "Pepsi brings your ancestors back from the dead." A similarly unfortunate outcome is popularly reported for GE's "We bring good things to life." http://www.all-lies.com/legends/business/products/pepsiinchina.shtml. Whether such stories are factual or apocryphal, the potential adverse consequences of cultural ignorance are real.

[5] "Courts cannot apply vague and ill-defined legal theories with any degree of consistency and predictability because the

Plaintiffs throughout the country advocate a wide variety of creative legal theories and legal lingo to advocate imputing jurisdiction to non-resident deep-pocket defendants. However, common-law theories, customarily used to impute liability of a subsidiary to a parent corporation, such as veil-piercing and agency, "tell us nothing about the various interests that must be balanced in the constitutional evaluation of judicial jurisdiction." *Rasmussen v. Gen. Motors Corp.*, 335 Wis.2d 1, 37, 803 N.W.2d 623, 641 (2011) (Abrahamson, C.J., concurring) (footnotes omitted).

In *Goodyear*, the Court stated that imputing one entity's contacts with the forum to another for purposes of establishing personal jurisdiction "requires an inquiry that is '"comparable to the corporate law question of piercing the corporate veil."' *Goodyear*, *supra*, at 2857. This appears to rule out agency theories; moreover, PLAC has found no case in which the Court has upheld any form of imputed jurisdiction against a due process challenge, even based on veil-piercing. Although the lower courts have done so in a variety of ways, *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), strongly indicates that corporate formalities should be respected when determining jurisdiction.

Despite the age of the *Cudahy* decision, the Court's more recent holdings also require courts to address separately each defendant's own contacts with the

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application of that theory will vary with each interpretation." Michael G. Albano, *Agency as a Means of Obtaining Jurisdiction in New York Over Foreign Corporations: A Failed Theory*," *supra*, at 199.

forum. *See Rush v. Savchuk*, *supra*; *Keeton v. Hustler Magazine, Inc.*, *supra*.

In addition, however, practical reasons also counsel great caution before permitting any variety of imputed jurisdiction to occur, particularly in respect of general jurisdiction. As one commentator notes, "The general jurisdiction veil-piercing cases reflect the worst abuses of modern jurisdictional doctrine." Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023, 1090 (2004) (emphasis supplied). Professor Hoffman adds:

> [E]xercising jurisdiction merely because a foreign corporate defendant has an ownership relationship with a forum affiliate--even where the cause of action does not arise from any actions taken by the defendant or its affiliate in the forum--stretches the boundaries of jurisdictional theory beyond any discernible limit.

Id., at 1092-93.

One of the purposes of the law of jurisdiction is to give potential defendants an opportunity to predict and control the states in which they will be subject to suit; it should therefore be desirable to enable defendants to determine the legal consequences of their actions for jurisdictional purposes. Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Cal. L. Rev. 1, 37 (1986). Moreover, the constitutional demands in challenges to personal jurisdiction for "minimum contacts" and purposeful availment" each "rest upon a particular notion of defendant-focused fairness." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.

Ct. 2780, 2793 (2011)(Breyer, J. concurring). At a minimum, therefore, due process protections should give product manufacturers fair notice of the conduct that will subject them to jurisdiction, as well as the ability to discern how to abstain from inadvertently subjecting themselves to it.

But the Ninth Circuit's method of determining jurisdiction provides no notice, no opportunity for manufacturers such as PLAC's members to predict or control the states in which they will be subject to suit, nor how to structure their affairs to avoid contact with the most problematic states.

The Court should not permit a common-law doctrine to extend jurisdiction beyond the limits of what due process permits. Regrettably, in basing its jurisdictional finding on its idiosyncratic notion of agency, the Ninth Circuit circumvented the due process inquiry altogether.

C. The Importance of Importance.

The Ninth Circuit's "agency" test for personal jurisdiction differs from the better-understood common-law rules of agency. For example, by definition, an independent contractor is ordinarily someone who is *not* an agent of the principal. *See e.g., Logue, supra.* However, under the Ninth Circuit's jurisdictional agency theory, "[W]hether the alleged general agent was a subsidiary of the principal or independently owned is irrelevant." *Bauman*, 644 F.3d at 922. Thus, "even if DCAG were to replace MBUSA with an independent entity, that entity would still be considered a representative for purposes of that test." *Id.*

Whereas *respondeat superior* typically depends upon the power to control the physical details of the agent's performance, the Ninth Circuit's agency jurisdictional test "is predicated upon a showing of the *special importance* of the services performed by the subsidiary." *Bauman*, 644 F.3d at 920 (emphasis in original). It is satisfied if the "'subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have *a representative* to perform them, the corporation's own officials would undertake to perform substantially similar services.'" *Id.*, at 920, quoting from *Doe v. Unocal Corp.*, 248 F.3d 915, 922, 928 (9th Cir.2001) (per curiam) (emphasis in original).

This court-created metamorphosis of traditional agency law makes little practical sense, however. In the real world, principals order agents to do unimportant things they would otherwise do for themselves (the codger law partner telling the young associate to fetch a cup of coffee); they frequently contract out critical, highly complex tasks *because* the principal lacks the specialized expertise that is readily available elsewhere. A helicopter manufacturer may contract out the manufacture of custom bushings for the tail rotor system (cf. *Russell v. SNFA*, 2013 IL 113909, 987 N.E.2d 778, 782 (2013)); an auto manufacturer may contract out motor vehicle restraint systems (cf. *Kilgore v. Fuji Heavy Indus. Ltd.*, 146 N.M. 698, 701, 213 P.3d 1127, 1130 (2009)). Such tasks frequently require distinct kinds of sophistication and expertise that a helicopter or automobile manufacturer may not have.

The Ninth Circuit's decision elevates "importance" to the decisive determinant of general jurisdiction. But no correlation exists between the importance of the task and the legal relationship between the business entities. Nor does the existence of such a relationship have any logical connection with personal jurisdiction. For purposes of imputed jurisdiction, "importance" should be unimportant, not decisive.

D. Agency Law is Not a Substitute for Due Process.

Equally startling is the Ninth Circuit's failure to consider whether its imprecise, "importance-based" analytical framework for imputed jurisdiction comports with this Court's established framework for analyzing due process constraints on personal jurisdiction. Whatever criteria a court applies to determine agency, the Due Process Clause constrains the power of a foreign court from exercising jurisdiction unless there has been "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475, *citing Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

By contracting with a separate corporate entity to perform the tasks of a domestic distributor in this case, Daimler AG did not invoke the benefits and protections of the forum's laws; it did precisely the opposite. It has evinced the clear intention *not* to avail itself of those protections and benefits. By stretching agency law to reach the opposite result, and treating two legal entities as one, the Ninth Circuit opinion tramples upon another due process protection: to assess each defendant's contacts with the forum separately. *See Rush, supra.* As stated in *Keeton, supra*:

> [J]urisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary.

465 U.S. 770, 781 n.13 (citations omitted). To satisfy this requirement of purposeful availment, a defendant must have "deliberately exploited the [state's] market" -- a standard akin to specific intent. *Keeton v. Hustler Magazine, Inc., supra*, 465 U.S. 770, 781 (1980). Jurisdiction is proper only where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum State. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 475, quoting *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957).

It follows that the Ninth Circuit's agency theory of imputed jurisdiction violates due process because it ignores these fundamental protections. To hold that a foreign business submits to personal jurisdiction based on one court's vague conception of a common-law agency doctrine constitutes an inadequate proxy for rigorous federal due process analysis.

Imputed jurisdiction based on the "special importance" of, and a right of control over, the tasks performed by the distributor, creates an unwinnable dilemma for non-resident manufacturers. If the manufacturer seeks to ensure that those with whom it contracts for these services comply with federal, state, and local regulations, demonstrate fiscal responsibility, and uphold the manufacturer's reputation for quality and integrity, the contractor is deemed to be the

manufacturer's agent—at least in the Ninth Circuit. But if a manufacturer permits the contractor to *dis*regard these obligations and thereby leaves the contractor an insignificant, impotent, financial shell, it may nevertheless be subjected to jurisdiction "for loosing on the world an undercapitalized corporation which is incorporated and doing business in [the jurisdiction] but unable to meet its obligations incurred there." *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 421 (9th Cir. 1977).

Either way, the vague, open-ended, overreaching jurisdictional rules utilized by the Ninth Circuit runs afoul of due process. This Court has long extolled the laudable objective that due process should allow "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Non-resident defendants are entitled to "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King Corp.*, 471 U.S. at 472 (quoting *Shaffer v. Heitner*, 433 U.S. at 218 (Stevens, J., concurring in judgment)). Fair warning "gives a degree of predictability to the legal system," *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). This predictability then allows entities doing business within and without our country's borders, be they foreign or domestic, to have true--as opposed to imputed or constructive--awareness of the possible risks their primary conduct will entail, and to manage those risks accordingly. Under the Ninth Circuit's decisions, even the most sophisticated manufacturer would be unable to determine how to structure its business to avoid being

sued in California, whether it consulted its counsel or the Oracle at Delphi.

Surprisingly, none of the Ninth Circuit's decisions squarely addresses the question whether the elements of its agency theory satisfy due process requirements. The Ninth Circuit's first recognition of vicarious jurisdiction, in *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 423 (9th Cir. 1977), relied on *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967):

> A foreign corporation is doing business in New York "in the traditional sense" when its New York representative provides services beyond "mere solicitation' and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.

Gelfand, 385 F.2d at 121. Notably *Gelfand* predates modern Supreme Court jurisprudence clarifying the due process limitations on personal jurisdiction. Indeed, the *Gelfand* court's cursory due process analysis relied primarily on New York state law predating much of this Court's personal jurisdiction.

Subsequently, in *World-Wide Volkswagen Corp. v. Woodson* [444 U.S. 286 (1980)] and *Rush v. Savchuk* [444 U.S. 320 (1980)], the Court addressed state courts' expansive exercise of jurisdiction over non-resident defendants and emphasized the importance of state sovereignty as a constitutional limitation on long-arm jurisdiction. *State Long-Arm and Quasi in Rem*

Jurisdiction: Volkswagen Corp. v. Woodson and Rush v. Savchuk, 94 Harv. L. Rev. 107 (1980). However, the Ninth Circuit's jurisdictional decisions since *Wells Fargo* have continued to expand the reach of agency theory while ignoring the question whether its agency theory has stretched itself beyond the outer limits of due process.

IV. CONCLUSION

For the foregoing reasons, PLAC respectfully asserts that the Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

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July 3, 2013

APPENDIX

APPENDIX
Corporate Members of the Product Liability Advisory Council
As of July 2, 2013

Total: 104

3M
Altec, Inc.
Altria Client Services Inc.
Anadarko Petroleum Corporation
AngioDynamics
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products, Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chrysler Group LLC
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation

Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, LLC
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors LLC
Georgia-Pacific Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.

Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic Corporation of North America
Peabody Energy
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
RJ Reynolds Tobacco Company
SABMiller Plc
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Techtronic Industries North America, Inc.
Teva Pharmaceuticals USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company

The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-965

JUL 5 2013
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In The
Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* VIEGA GmbH & CO. KG AND VIEGA INTERNATIONAL GmbH IN SUPPORT OF PETITIONER DAIMLERCHRYSLER AG

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RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that *amicus* Viega GmbH & Co. KG is a *Kommanditgesellschaft* or German limited partnership and *amicus* Viega International GmbH is a *Gesellschaft mit beschränkter Haftung*, or German limited liability company. Viega GmbH & Co. KG is the sole member of Viega International GmbH. No parent company and no publicly held company owns 10% or more of Viega GmbH & Co. KG membership interests.

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INTEREST OF *AMICI CURIAE*[1]

Viega GmbH & Co. KG ("Viega GmbH") and Viega International GmbH ("Viega International") (collectively for purposes of this *amicus curiae* brief only, the "German Viega Companies") are a *Kommanditgesellschaft,* or German limited partnership, and a *Gesellschaft mit beschränkter Haftung,* or German limited liability company, or German limited liability companies, with their respective "*Sitz*" ("seat"), or effective place of business, in Attendorn, Germany. Viega International is wholly owned by Viega GmbH, which is and always has been family-owned. The German Viega Companies design and manufacture plumbing and heating products in Germany and are foreign corporations that have no contact with the United States. Only their distinct and separate U.S. subsidiaries have such contact.

The German Viega Companies' interest in the outcome of this case stems from being subjected to general personal jurisdiction in several[2] cases in the

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel made any monetary contribution toward the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of *amicus curiae* briefs in support of either party or of neither party.

[2] Several class action complaints have been filed against the German Viega Companies in the United States District Court for the District of Nevada. *See Waterfall Homeowners Assoc., et al. v. Viega, Inc., et al.*, Case No. 2:11-cv-1498 (D. Nev.); *Southern Terrace Homeowners Assoc. v. Viega, Inc., et al.*, Case

(Continued on following page)

United States District Court for the District of Nevada (the "District Court") and in Nevada state courts in Clark County, Nevada.[3] In exerting such general personal jurisdiction, the District Court felt bound by *Bauman v. DaimlerChrysler Corp. ("Bauman")*, 644 F.3d 909 (9th Cir. 2011), notwithstanding the German Viega Companies' lack of any contact – much less continuous and systematic contact – with the forum state. *See Waterfall*, Dkt. 127 at 5:17-21.[4]

No. 2:12-cv-0206 (D. Nev.); and *Anthem Highlands Comm. Assoc. v. Viega, Inc., et al.*, Case No. 2:12-cv-0207 (D. Nev.). These cases were subsequently consolidated into one action in the District of Nevada. *See Hartmann, et al. v. Uponor, Inc., et al.*, Case No. 2:08-cv-01223-RCJ-GWF (D. Nev.), Dkt. 718 (severing and consolidating claims against the German Viega Companies into the *Waterfall* action).

[3] In November 2011, the German Viega Companies were also found subject to general personal jurisdiction by Nevada state courts, which were persuaded by *Bauman*. The German Viega Companies sought relief from the Nevada Supreme Court, which decided to hear the issue and requested briefing. *See Viega GmbH, et al. v. Eighth Judicial Dist. Court (Aventine-Tramonti Homeowners' Assoc.)*, No. 59976 (Nev. filed Jan. 4, 2012); *Viega GmbH, et al. v. Eighth Judicial Dist. Court (La Paloma Homeowners' Assoc.)*, No. 60015 (Nev. filed Jan. 10, 2012). The cases have been fully briefed, argued and submitted. In the meantime, the German Viega Companies also gave notice to the Nevada Supreme Court that this Court granted certiorari in *Bauman*. The Nevada Supreme Court has yet to hand down a decision. For simplicity's sake, the remainder of this *amicus* brief will focus on the federal court litigation although the federal due process issue in all of these cases is the same.

[4] Factual references throughout this *amicus* brief are supported by the record in *Waterfall* and the United States District Court for the District of Nevada case *Slaughter, et al. v.*

(Continued on following page)

The German Viega Companies relied upon established corporate law throughout the United States in deciding to invest in the United States through subsidiaries. The German Viega Companies observed all necessary corporate formalities that maintained those subsidiaries as separate and distinct legal entities. Nevertheless, the District Court relied upon the agency theory articulated in *Bauman*, and solely because "[t]he German Viega Defendants are ... alleged to be the parents of subsidiaries over which there is general jurisdiction in Nevada," exerted general personal jurisdiction over those foreign entities. *Id.* As a result, the question presented to this Court is the very issue of law upon which the Nevada District Court relied to find general personal jurisdiction over the German Viega Companies.

The German Viega Companies submit this *amicus curiae* brief to provide the Court with a first-hand example of the fallout from *Bauman* on foreign entities that have no contacts with the United States but that nevertheless are being subjected to general personal jurisdiction as a result of the Ninth Circuit's wide-reaching decision.

Uponor, Inc., et al., renamed *Hartmann, et al. v. Uponor, Inc., et al.*, Case No. 2:08-cv-01223-RCJ-GWF (D. Nev.).

SUMMARY OF THE ARGUMENT

Bauman erroneously subjects companies like the German Viega Companies to litigation in a forum state notwithstanding the lack of any contacts with that forum. Absent reversal, *Bauman* exposes such companies to the risk of being haled into court in any jurisdiction in which their direct or indirect subsidiaries conduct business. This result is contrary to long-standing principles of corporate law that recognize parent companies and their subsidiaries as legally distinct. The German Viega Companies have scaled back investment in the U.S. because of *Bauman*, and those cases that have followed *Bauman*. Since these *Bauman*-influenced decisions, the German Viega Companies have been expanding investments in other countries, such as ones in Asia, with more predictable legal environments. Absent reversal, the German Viega Companies will consider divesting in the United States, and will recommend to other similarly situated companies to do the same.

Where a subsidiary's actions cannot be imputed to a parent corporation for liability purposes as long as the entities maintain separate corporate identities, so too, a parent corporation should be protected from general personal jurisdiction that arises solely from its subsidiary's contact with the forum state. Corporate law demands that a parent and subsidiary that comply with the requirements necessary to maintain their separate corporate existences – as the German Viega Companies and their American subsidiaries did

– be recognized as distinct entities for *all* legal purposes. Anything less lends itself to an unpredictable business environment that discourages outside investment in the United States by potential investors like the German Viega Companies, in contravention of the very principles that have guided the development of corporate law in this country. For these reasons, *Bauman* must be reversed.

ARGUMENT

I. The German Viega Companies Sought To Invest In The United States In Reliance Upon Well-Established Principles of Corporate Law

A. The United States Has Long Recognized And Protected Distinct Corporate Identities

Long-standing principles of corporate law demand that *Bauman* be reversed. It is well established that a parent corporation is considered separate and distinct from its subsidiaries if each maintains a separate corporate existence. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). To that end, this Court has recognized that "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *Id.* at 61 (internal quotations and

citations omitted). Such respect for corporate separateness is no less important when deciding whether to subject foreign companies with U.S. subsidiaries to the jurisdiction of U.S. courts.

As the law recognizes, creation of a parent/subsidiary relationship while preserving a separate corporate existence between the two entities is an important economic engine for United States business activities. *See, e.g., Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *see generally Bestfoods*, 524 U.S. at 61; *see also Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) ("The law allows businesses to incorporate to limit liability and isolate liabilities among separate entities."); *All Star, Inc. v. Fellows*, 676 S.E.2d 808, 813 (Ga.App. 2009) ("The law of corporations is founded on the legal principle that each corporation is a separate entity.") (internal quotation and citation omitted). This balance struck in corporate law allows each company to manage its business, yet gives a parent corporation some control over its subsidiary while concurrently benefitting from less exposure to legal risk. *See generally Bestfoods*, 524 U.S. at 61. Moreover, corporate law allows a corporation to engage in a new line of business activity perhaps unrelated to its current business and to obtain new and diverse revenue to sustain and supplement current revenue. *See generally Boulder Acquisition Corp. v. Unemployment Ins. Appeals of Indiana Dept. of Workforce Dev.*, 976 N.E.2d 1282, 1288 (Ind.App. 2012) ("[T]he law of corporations

allows a parent company to benefit by creating legally separate subsidiary companies which the parent company owns. . . .").

By providing a degree of assurance that corporate separateness will isolate a parent company from the legal risks associated with an American subsidiary, U.S. corporate law has encouraged business growth and diverse investment by foreign companies. *See generally Bestfoods*, 524 U.S. at 61. Parent companies and their subsidiaries have grown to depend upon the law that one entity's actions cannot be imputed to the other notwithstanding the parent/subsidiary relationship. *Id.* The *Bauman* decision eviscerates this well-established principle.

B. Relying Upon These Well-Established Principles Of Corporate Law, The German Viega Companies Invested In The United States

The protections of U.S. corporate law have guided the business decisions of the German Viega Companies. The German Viega Companies have avoided conducting business directly in the United States in order to avoid direct liability and to prevent the potentially significant tax exposure that could result from such conduct. *Waterfall*, Dkt. 80-1 ¶ 22. Nevertheless, like many foreign businesses, the German Viega Companies sought to diversify and take advantage of opportunities for new revenue and business growth

outside of Germany. To that end, guided by U.S. corporate law (*see Bestfoods*, 524 U.S. at 61; *see, e.g., Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335-37 (1925)), the German Viega Companies created subsidiaries to engage in United States commerce while, at the same time, maintaining the parent companies' separate German corporate identity. *See generally Waterfall*, Dkt. 80 and 80-1. The German Viega Companies' approach was not just allowed by U.S. corporate law, but, until the Ninth Circuit's decision in *Bauman*, was outright encouraged in order to promote foreign investment in this country. *See Bestfoods*, 524 U.S. at 61.

In October 2005, seeking to accomplish their goal of diversification and to invest in established domestic corporations (with the incidental benefit to both the German Viega Companies and United States commerce), Viega, Inc., a separate and distinct Delaware corporation with its principal place of business in Massachusetts, became the sole shareholder of Vanguard Industries, Inc., a Kansas corporation, which in turn was the 100% shareholder of Vanguard Piping Systems, Inc., also a Kansas corporation. *Waterfall,* Dkt. 80-1 ¶¶ 5 and 7. Subsequent to the acquisition of the Vanguard entities, Viega, Inc. relocated its principal place of business to Kansas. *Id.* ¶ 5. Through these transactions, in 2005, Vanguard Industries, Inc. and Vanguard Piping Systems, Inc. (the "Vanguard Entities") became, through Viega, Inc., *indirect* subsidiaries of the German Viega Companies. *Id.*

In January 2007, the operations of the Vanguard Entities were moved into Viega, LLC, a Delaware limited liability company formed in 2006 with its principal place of business in Kansas. *Id.* ¶ 9. Viega, Inc. is the sole member of Viega, LLC. *Id.* Thus, Viega, LLC remained an *indirect* subsidiary of the German Viega Companies. Both Viega, Inc. and Viega, LLC maintained their separate identities as Delaware corporations with their principal places of business in Kansas.

At all pertinent times and consistent with U.S. corporate law, the German Viega Companies have remained wholly separate and distinct corporations from Vanguard Industries, Inc.; Vanguard Piping Systems, Inc.; VG Pipe, LLC; Viega, Inc.; and Viega, LLC (the "American Vanguard/Viega Companies"). The German Viega Companies purposefully do not exercise control over the day-to-day business operations of the American Vanguard/Viega Companies or any other subsidiary of the German Viega Companies in the United States. *Id.* ¶ 12. None of the American Vanguard/Viega Companies in the United States is an agent of the German Viega Companies; rather, each subsidiary is a separate and distinct legal entity operating on its own behalf. *Id.* ¶ 13.

At all times, the German Viega Companies have strictly observed all corporate formalities necessary to maintain the separate legal existence of each and all of their American subsidiaries. *Id.* ¶ 7. As a result, until the Ninth Circuit issued its far-reaching decision in *Bauman*, U.S. corporate law allowed the

German Viega Companies (and other foreign companies like the German Viega Companies) to invest and promote growth in the United States without being subject to the general jurisdiction of U.S. courts based on subsidiaries' contacts.

II. Based Upon *Bauman*'s Overreaching Rule, The Nevada District Court Asserted Personal Jurisdiction Over The German Viega Companies Simply Because They Invested In The United States

A. The Evidence Submitted By The German Viega Companies Demonstrated The Absence Of Any Contacts With Nevada

On September 16, 2011, two homeowners associations filed suit against the U.S. indirect subsidiaries of the German Viega Companies, the American Vanguard/Viega Companies, for their alleged involvement in the design, manufacture, and construction of so-called "defective high-zinc-content brass [] fittings and potable-water-delivery systems and attendant high-zinc-content brass plumbing components. . . ." *Waterfall,* Dkt. 1 ¶ 33. Despite the corporate distinction between the German Viega Companies and their indirect U.S. subsidiaries, and despite the fact that the fittings and systems at issue were not manufactured by the German Viega Companies but rather manufactured by third parties and distributed by the U.S. entities, plaintiffs nevertheless also named the

German Viega Companies as defendants. *Waterfall*, Dkt. 1.

Because the German Viega Companies had no contact with the forum state, did not design, manufacture, market, construct, distribute, guarantee or sell the plumbing components in question and only had an *indirect* relationship with the American Vanguard/Viega Companies, on February 8, 2012, the German Viega Companies filed a Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to FRCP 12(b)(2). *Waterfall*, Dkt. 80. The German Viega Companies argued that the District Court could not assert either specific[5] or general personal jurisdiction over the German Viega Companies and therefore should dismiss them from the lawsuit. *Id.*

Addressing general personal jurisdiction, the German Viega Companies provided evidence to the District Court (and the Nevada state courts in the Nevada state litigation) that the German Viega Companies do not do business in the State of Nevada, do not maintain any office, agency or representative in Nevada, and are not qualified, licensed or authorized

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[5] Because the present issue before the Court and the basis for the District Court's assertion of personal jurisdiction involves *general* personal jurisdiction, the German Viega Companies do not advance their arguments against specific jurisdiction here. *See Waterfall*, Dkt. 104 at 20:14-17 and Dkt. 127 at 5:17-21. Nonetheless, the Vanguard-entity products at issue in the Nevada litigation were not designed, manufactured, distributed, marketed, or guaranteed by the German Viega Companies.

to do business in Nevada. *Waterfall*, Dkt. 80-1 ¶ 10. Moreover, no one is authorized by the German Viega Companies to accept service of process in Nevada, and the German Viega Companies have never appointed an agent for service of process in Nevada. *Id.*

By way of sworn affidavits and sworn declarations, as applicable, the German Viega Companies demonstrated that they do not conduct advertising or solicitation activities or sales, service or other business activities in Nevada. *Id.* ¶ 11. For that reason, the German Viega Companies do not enter into any contracts to insure a person, property or other risk in the state. *Id.* The German Viega Companies have never sold any products in Nevada, do not design any Viega products specifically for the Nevada market, and have not created, and do not employ or control any distribution system in Nevada. *Id.* ¶¶ 13-14.

B. Bound By The Ninth Circuit's Erroneous Decision In *Bauman*, The Nevada District Court Asserted General Personal Jurisdiction Over The German Viega Companies

Notwithstanding the undisputed evidence that the German Viega Companies had no contact with the forum state, the District Court denied the German Viega Companies' motion to dismiss and asserted general personal jurisdiction over the foreign entities. Deferring to its own 2009 order in *Slaughter, et al. v. Uponor, Inc., et al.*, Case No. 2:08-cv-01223

(D. Nev. 2009), Dkt. No. 259, which in turn had relied upon the Ninth Circuit's first, now superseded, *Bauman* decision, *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088 (9th Cir. 2009), the District Court held: "As the Court ruled with respect to the Finnish Uponor Defendants in *Slaughter*, there is agency jurisdiction over these foreign companies. (*See* Order, Nov. 19, 2009, ECF No. 259 in Case No. 2:08-cv-01223 (quoting [*Bauman*], 579 F.3d 1088, 1094-95 (9th Cir. 2009)))." *Waterfall*, Dkt. 104 at 20:14-17.

In *Slaughter*, the same District Court Judge found that the Finnish corporation "purposefully sold, *through its subsidiaries*, products in Nevada such that it should reasonably be expected to be haled into a Nevada court if those activities result in alleged harm." *See Slaughter*, Dkt. 259 at 10:22-11:2 (emphasis added). Using this same *Bauman* analysis, the District Court exerted general personal jurisdiction over the German Viega Companies. *Waterfall*, Dkt. 104 at 20:14-17.

The German Viega Companies sought reconsideration (*Waterfall*, Dkt. 108), arguing that this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011), undermined the District Court's application of the "agency jurisdiction" theory. *Waterfall*, Dkt. 108 at 2:5-12. The District Court was not persuaded for two reasons. First, while the first *Bauman* decision had been vacated by the Ninth Circuit since the District Court had issued its *Slaughter* decision, on May 18, 2011

after rehearing, the Ninth Circuit had once again applied an agency jurisdiction theory in the *Bauman* decision now before this Court. *Waterfall*, Dkt. 127 at 5:7-10 (citing *Bauman*).

Second, the District Court rejected the German Viega Companies' argument that *Goodyear* undermines the *Bauman* agency jurisdiction theory: "[t]he German Viega Defendants are alleged to be not subsidiaries whose products came to the Nevada forum through no action of their own and who have no contact with Nevada directly or through their own subsidiaries, ***but rather they are alleged to be the parents of subsidiaries over which there is general jurisdiction in Nevada.***" *Waterfall*, Dkt. 127 at 5:16-21 (emphasis added). As a result, the District Court concluded that the German Viega Companies "stand in a different position than did the *Goodyear* subsidiaries." *Id.* In other words, applying *Bauman*, the District Court asserted general personal jurisdiction over foreign entities that had *no contact* with the State of Nevada simply because the German Viega Companies were alleged to be the *parents of subsidiaries* who were subject to personal jurisdiction in Nevada. *Id.*

III. Like The *Bauman* Foreign Defendants, The German Viega Companies Should Not Be Subject To General Personal Jurisdiction Simply Because They Are Parent Corporations To Indirect Subsidiaries Doing Business In The United States

Fundamental principles of corporate law demand that both the *Bauman* defendants and the German Viega Companies be protected from general personal jurisdiction. Just as a subsidiary's actions will not be imputed to the parent corporation for purposes of liability (*Bestfoods*, 524 U.S. at 61), this Court already has provided the legal framework for answering the question of whether personal jurisdiction over a parent corporation can be established through its subsidiary: "[J]urisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary. ***Each defendant's contacts with the forum State must be assessed individually***." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, n.13 (1984) (internal citations omitted) (emphasis added). Conducting a separate jurisdictional analysis for each parent and subsidiary allows each entity to anticipate and manage risks in conducting its business. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions."); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotations and citations omitted) ("By requiring that individuals have fair warning that a particular activity may

subject [them] to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to whether that conduct will and will not render them liable to suit.").

Bauman undermines this predictability inherent to U.S. corporate law, and the District Court's application of *Bauman* to assert general personal jurisdiction over the German Viega Companies underscores the capricious legal environment created by the Ninth Circuit's erroneous decision. In this altered legal landscape, foreign entities such as the German Viega Companies must reevaluate the costs and benefits of their continued investment in the United States. *Bauman* leaves foreign corporations that have no contact with the forum state other than a relationship with indirect subsidiaries without any guideposts as to how to conduct their activities and manage risks going forward.

The German Viega Companies chose to invest in American companies in reliance on the long-standing tenet that investors or parent companies that observe corporate formalities when establishing and overseeing subsidiaries will be treated as distinct entities. Yet, *Bauman* allowed a forum state with which the German Viega Companies had no contact to assert general personal jurisdiction, presuming that the parent and subsidiary companies were simply one. As a result of *Bauman*, the German Viega Companies are now subject to litigation in Nevada based on the

alleged misdeeds of distinct subsidiary companies. Thus, they are prone to suit in any state in which their indirect subsidiaries conduct business – regardless of the fact that the German Viega Companies are separate corporate entities under U.S. law, and are uninvolved in the alleged misdeeds at issue.

For the German Viega Companies, the implications of *Bauman* are wide reaching. With *Bauman* controlling, the only means by which the German Viega Companies can minimize their risk of having to litigate in a forum in which their indirect subsidiaries conduct business is to avoid the forum completely. This means closing the subsidiaries and avoiding any business in the state altogether. The German Viega Companies have for the moment decided to limit any further U.S. investments until the legal situation is clarified, and have chosen in the meantime to invest in other countries that more predictably apply the relevant corporate law with respect to these types of investments. Unless this Court definitively rejects *Bauman*, not only will the German Viega Companies consider both continuing the moratorium on U.S. investments and divesting themselves of their current U.S. investments, but they will also recommend to other similarly-situated foreign investors to do the same.

CONCLUSION

The application of *Bauman* to the German Viega Companies demonstrates that *Bauman* violates the well-established principle that a parent corporation is considered separate and distinct from its subsidiaries as long as separate corporate existence is maintained. In ruling that general personal jurisdiction can be exerted over a foreign entity solely through the contacts of its indirect subsidiary, *Bauman* – in contravention of the most fundamental notions of due process – creates an unpredictable legal landscape for foreign business and thereby stifles foreign investment in the United States. For these reasons, the Ninth Circuit's *Bauman* decision should be reversed.

Respectfully submitted,

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